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REPORTS OF CASES

DECIDED BETWEEN

JULY 27, 2007 and FEBRUARY 7, 2008

IN THE

Supreme Court of Nebraska

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VOLUME CCLXXIV

PEGGY POLACEK

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By Peggy Polacek, Reporter of the Supreme Court
and the Court of Appeals

For the benefit of the State of Nebraska

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JUDICIAL DISTRICTS AND DISTRICT JUDGES

Number of District	Counties in District	Judges in District	City
First	Clay, Fillmore, Gage, Jefferson, Johnson, Nemaha, Nuckolls, Pawnee, Richardson, Saline, and Thayer	Paul W. Korslund	Beatrice
		Daniel E. Bryan, Jr.	Auburn
		Vicky L. Johnson	Wilber
Second	Cass, Otoe, and Sarpy	Randall L. Rehmeier	Nebraska City
		William B. Zastera	Papillion
		David K. Arterburn	Papillion
		Max Kelch	Papillion
Third	Lancaster	Jeffre Cheuvront	Lincoln
		Earl J. Witthoff	Lincoln
		Paul D. Merritt, Jr.	Lincoln
		Karen B. Flowers	Lincoln
		Steven D. Burns	Lincoln
		John A. Colborn	Lincoln
		Jodi Nelson	Lincoln
Fourth	Douglas	J. Patrick Mullen	Omaha
		John D. Hartigan, Jr.	Omaha
		Joseph S. Troia	Omaha
		Gerald E. Moran	Omaha
		Gary B. Randall	Omaha
		Patricia A. Lamberty	Omaha
		J. Michael Coffey	Omaha
		Sandra L. Dougherty	Omaha
		W. Mark Ashford	Omaha
		Peter C. Bataillon	Omaha
		Gregory M. Schatz	Omaha
		J Russell Derr	Omaha
		James T. Gleason	Omaha
		Thomas A. Otepka	Omaha
		Marlon A. Polk	Omaha
		W. Russell Bowie III	Omaha

JUDICIAL DISTRICTS AND DISTRICT JUDGES

Number of District	Counties in District	Judges in District	City
Fifth	Boone, Butler, Colfax, Hamilton, Merrick, Nance, Platte, Polk, Saunders, Seward, and York	Robert R. Steinke	Columbus
		Alan G. Gless	Seward
		Michael J. Owens	Aurora
		Mary C. Gilbride	Wahoo
Sixth	Burt, Cedar, Dakota, Dixon, Dodge, Thurston, and Washington	Darvid D. Quist	Blair
		John E. Samson	Fremont
		William Binkard	Dakota City
Seventh	Antelope, Cuming, Knox, Madison, Pierce, Stanton, and Wayne	Robert B. Ensz	Wayne
		Patrick G. Rogers	Norfolk
Eighth	Blaine, Boyd, Brown, Cherry, Custer, Garfield, Greeley, Holt, Howard, Keya Paha, Loup, Rock, Sherman, Valley, and Wheeler	Mark D. Kozisek	Ainsworth
		Karin L. Noakes	St. Paul
Ninth	Buffalo and Hall	John P. Icenogle	Kearney
		James D. Livingston	Grand Island
		Teresa K. Luther	Grand Island
		William T. Wright	Kearney
Tenth	Adams, Franklin, Harlan, Kearney, Phelps, and Webster	Stephen R. Illingworth	Hastings
		Terri S. Harder	Minden
Eleventh	Arthur, Chase, Dawson, Dundy, Frontier, Furnas, Gosper, Hayes, Hitchcock, Hooker, Keith, Lincoln, Logan, McPherson, Perkins, Red Willow, and Thomas	John P. Murphy	North Platte
		Donald E. Rowlands	North Platte
		James E. Doyle IV	Lexington
		David Urbom	McCook
Twelfth	Banner, Box Butte, Cheyenne, Dawes, Deuel, Garden, Grant, Kimball, Morrill, Scotts Bluff, Sheridan, and Sioux	Brian C. Silverman	Alliance
		Randall L. Lippstreu	Gering
		Kristine R. Cecava	Sidney
		Leo Dobrovolny	Gering

JUDICIAL DISTRICTS AND COUNTY JUDGES

Number of District	Counties in District	Judges in District	City
First	Gage, Jefferson, Johnson, Nemaha, Pawnee, Richardson, Saline, and Thayer	Curtis L. Maschman	Falls City
		J. Patrick McArdle	Wilber
		Steven B. Timm	Beatrice
Second	Cass, Otoe, and Sarpy	Robert C. Wester	Papillion
		John F. Steinheider	Nebraska City
		Todd J. Hutton	Papillion
		Jeffrey J. Funke	Papillion
Third	Lancaster	James L. Foster	Lincoln
		Gale Pokorny	Lincoln
		Mary L. Doyle	Lincoln
		Laurie Yardley	Lincoln
		Jean A. Lovell	Lincoln
		Susan I. Strong	Lincoln
Fourth	Douglas	Stephen M. Swartz	Omaha
		Lyn V. White	Omaha
		Thomas G. McQuade	Omaha
		Edna Atkins	Omaha
		Lawrence E. Barrett	Omaha
		Joseph P. Caniglia	Omaha
		Marcena M. Hendrix	Omaha
		Darryl R. Lowe	Omaha
		John E. Huber	Omaha
		Jeffrey Marcuzzo	Omaha
		Craig Q. McDermott	Omaha
		Susan Bazis	Omaha
Fifth	Boone, Butler, Colfax, Hamilton, Merrick, Nance, Platte, Polk, Saunders, Seward, and York	Curtis H. Evans	York
		Gerald E. Rouse	Columbus
		Frank J. Skorupa	Columbus
		Patrick R. McDermott	David City
		Marvin V. Miller	Wahoo
		Linda S. Caster Senff	Aurora

JUDICIAL DISTRICTS AND COUNTY JUDGES

Number of District	Counties in District	Judges in District	City
Sixth	Burt, Cedar, Dakota, Dixon, Dodge, Thurston, and Washington	C. Matthew Samuelson	Blair
		Kurt Rager	Dakota City
		Douglas L. Luebe	Hartington
		Kenneth Vampola	Fremont
Seventh	Antelope, Cuming, Knox, Madison, Pierce, Stanton, and Wayne	Richard W. Krepela	Madison
		Donna F. Taylor	Madison
		Ross A. Stoffer	Pierce
Eighth	Blaine, Boyd, Brown, Cherry, Custer, Garfield, Greeley, Holt, Howard, Keya Paha, Loup, Rock, Sherman, Valley, and Wheeler	August F. Schuman	Ainsworth
		Alan L. Brodbeck	O'Neill
		Gary G. Washburn	Burwell
Ninth	Buffalo and Hall	David A. Bush	Grand Island
		Philip M. Martin, Jr.	Grand Island
		Gerald R. Jorgensen, Jr.	Kearney
		Graten D. Beavers	Kearney
Tenth	Adams, Clay, Fillmore, Franklin, Harlan, Kearney, Nuckolls, Phelps, and Webster	Jack R. Ott	Hastings
		Robert A. Ide	Holdrege
		Michael Offner	Hastings
Eleventh	Arthur, Chase, Dawson, Dundy, Frontier, Furnas, Gosper, Hayes, Hitchcock, Hooker, Keith, Lincoln, Logan, McPherson, Perkins, Red Willow, and Thomas	Kent E. Florom	North Platte
		Kent D. Turnbull	North Platte
		Carlton E. Clark	Lexington
		Edward D. Steenburg	Ogallala
		Anne Paine	McCook
Twelfth	Banner, Box Butte, Cheyenne, Dawes, Deuel, Garden, Grant, Kimball, Morrill, Scotts Bluff, Sheridan, and Sioux	Charles Plantz	Rushville
		James T. Hansen	Chadron
		G. Glenn Camerer	Gering
		James M. Worden	Gering
		Randin Roland	Sidney

SEPARATE JUVENILE COURTS AND JUVENILE COURT JUDGES

County	Judges	City
Douglas	Douglas F. Johnson	Omaha
	Elizabeth Crnkovich	Omaha
	Wadie Thomas	Omaha
	Christopher Kelly	Omaha
	Vernon Daniels	Omaha
Lancaster	Toni G. Thorson	Lincoln
	Linda S. Porter	Lincoln
	Roger J. Heideman	Lincoln
	Reggie L. Ryder	Lincoln
Sarpy	Lawrence D. Gendler	Papillion
	Robert B. O'Neal	Papillion

WORKERS' COMPENSATION COURT AND JUDGES

Judges	City
Michael P. Cavel	Omaha
James R. Coe	Omaha
Laureen K. Van Norman	Lincoln
Ronald L. Brown	Lincoln
J. Michael Fitzgerald	Lincoln
Michael K. High	Lincoln
John R. Hoffert	Lincoln

ATTORNEYS
Admitted Since the Publication of Volume 273

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Dennis Lee Althouse
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Carl Norman Anderson III
Wesley Harold Bain
Kristin Morgan Streff Barnett
Brent William Beller
Christine Clare Benson
Ross Michael Berg
Amy Katz Bonn
Brandon Sean Boss
Charlotte Downey Boswell
Michael Ernest Boyd
Joseph Charles Bradley
Jonathan Roy Brandt
Alison Marie Breuning
Michael Timothy Brewer
Kathleen Lee Brundo
Nathan Thomas Bruner
Lindsey Rae Buchheit
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Florin Cornel Campean
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John Michael Carter
Cassidy Victoria Chapman
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Nathaniel Paul DeWald
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Thomas James Freeman
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Tara Lynn Gardner
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Christopher Harkert Hawkins
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John Joseph Heieck
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Sarah James Hestad

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JESSIE CHEYENNE HOLYOAK
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JENNIFER MARIE HOULDEN
SARA PATRICIA HULAC
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RAMZI JEWEL HYNEK
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JOSEPH DANIEL WEIDNER
ERIC WADE WELLS
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ADAM ROBERT WHITE
HENRY LAURENCE WIEDRICH
ISAIAH WILSON II
GREGORY DEAN WORTH
DARREN STEPHEN WRIGHT
NICHOLAS EDMUND WURTH
DEREK CHARLES ZIMMERMAN

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No. S-06-012: **Classic Auto Sales v. Omaha Dealership Acquisition**. Affirmed. Per Curiam. McCormack, J., not participating.

No. S-06-016: **Petry v. Petry**. Affirmed. Gerrard, J.

No. S-06-287: **Arias v. Bohn**. Affirmed. Per Curiam.

No. S-06-358: **Tenet Healthcare Corp. v. Dankof**. Affirmed. Heavican, C.J.

No. S-06-454: **In re Estate of Rosso**. Affirmed. Stephan, J.

No. S-06-561: **State v. Jones**. Affirmed. Stephan, J. Heavican, C.J., not participating.

No. S-06-622: **State on behalf of Jackson v. Jackson**. Affirmed. Gerrard, J.

No. S-06-632: **Gangwish v. Gangwish**. Affirmed. Wright, J.

No. S-06-677: **Armbruster v. Baird, Holm**. Affirmed in part, and in part reversed. Connolly, J.

No. S-06-911: **Merida v. Centeno**. Affirmed. Gerrard, J.

No. S-06-1338: **Exchange Bank v. Arp**. Reversed and remanded for further proceedings. Connolly, J.

No. S-07-302: **Foster v. BryanLGH Med. Ctr. East**. Affirmed as modified. Stephan, J.

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No. S-06-412: **Alleman v. Alleman**. Appeal dismissed.

No. S-06-466: **Sjuts v. State ex rel. Bruning**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-06-954: **City of LaVista v. Long**. Appeal dismissed. See rule 8A.

No. S-06-1218: **State v. Harris**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. S-06-1224: **Bracht v. Neth**. Affirmed. See, rule 7A(1); *In re Interest of Fedalina G.*, 272 Neb. 314, 721 N.W.2d 638 (2006); *Moore v. Peterson*, 218 Neb. 615, 358 N.W.2d 193 (1984).

No. S-06-1230: **Farritor v. Neth**. Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. S-07-054: **State v. Ball**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

Nos. S-07-074, S-07-094: **In re Guardianship & Conservatorship of Larson**. Appeal dismissed as moot. See, rule 7A(2); *Rath v. City of Sutton*, 267 Neb. 265, 673 N.W.2d 869 (2004); *Beachy v. Becerra*, 259 Neb. 299, 609 N.W.2d 648 (2000).

No. S-07-181: **State ex rel Counsel for Dis. v. Brogan**. Respondent was temporarily suspended on March 21, 2007. Parties have stipulated to respondent's violation of provisions of Nebraska Rules of Professional Conduct, and referee has found that respondent violated those provisions as well as her oath of office as an attorney. See Neb. Rev. Stat. § 7-104 (Reissue 1995). Court finds that respondent has violated Neb. Ct. R. of Prof. Cond. 1.3 and 8.4(a) and (d) (rev. 2005), as well as her oath of office as an attorney. Court finds that respondent should be and hereby is suspended from the practice of law for 9 months and that the suspension should be retroactive to

March 21, 2007. Respondent must pay costs and expenses if awarded. See, Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 1995); Neb. Ct. R. of Discipline 10(P) (rev. 2005) and 23(B) (rev. 2001). Respondent may apply for reinstatement at the end of her suspension period.

No. S-07-250: **State v. McDonald**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Marshall*, 272 Neb. 924, 725 N.W.2d 834 (2007); *State v. Deckard*, 272 Neb. 410, 722 N.W.2d 55 (2006).

No. S-07-339: **Hansen v. Board of Ed. of Plattsmouth Comm. Sch**. Motion of appellee for summary dismissal sustained. See rule 7B(1).

No. S-07-447: **Jefferson v. State**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *Ichtertz v. Orthopaedic Specialists of Neb.*, 273 Neb. 466, 730 N.W.2d 798 (2007) (res judicata bars relitigation of matter directly addressed or necessarily included in former adjudication); *In re Estate of Jefferson*, Nos. A-01-1384, A-01-1385, 2003 WL 21443740 (Neb. App. June 24, 2003) (not designated for permanent publication).

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No. A-05-379: **ADT Security Servs. v. A/C Security Systems**, 15 Neb. App. 666 (2007). Petition of appellee for further review overruled on September 20, 2007.

No. A-05-460: **Perez v. City of Omaha**, 15 Neb. App. 502 (2007). Petition of appellant for further review overruled on August 29, 2007.

No. A-05-461: **Pasko v. City of Omaha**. Petition of appellant for further review overruled on August 29, 2007.

No. A-05-693: **State Law Enforcement Barg. Council v. State**. Petition of appellee for further review overruled on July 18, 2007.

No. A-05-849: **In re Charles C. Wells Revocable Trust**, 15 Neb. App. 624 (2007). Petition of appellant for further review overruled on August 29, 2007.

No. A-05-895: **City of Ashland v. Remmen**. Petition of appellee for further review overruled on November 21, 2007.

No. A-05-898: **Applied Underwriters v. Employer Outsource Serv**. Petition of appellant for further review overruled on July 18, 2007.

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No. A-05-1007: **Goeke v. Goeke**. Petition of appellee for further review overruled on October 16, 2007.

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No. A-05-1077: **Harris v. Spring Ctr. Mental Health Agency**. Petition of appellant for further review overruled on September 26, 2007.

No. A-05-1084: **Trueblood v. Roberts**, 15 Neb. App. 579 (2007). Petition of appellee for further review overruled on September 20, 2007.

No. A-05-1172: **State v. Frazier**. Petition of appellant for further review overruled on July 18, 2007.

No. A-05-1190: **State v. Brown**. Petition of appellant for further review overruled on August 29, 2007.

No. A-05-1200: **Damrow v. Murdoch**, 15 Neb. App. 920 (2007). Petition of appellant for further review overruled on October 24, 2007.

No. A-05-1215: **State on behalf of F.J. v. McSwine**. Petition of appellant for further review overruled on October 31, 2007.

No. S-05-1250: **Yah v. Select Portfolio**. Petition of appellant for further review overruled on October 30, 2007.

No. A-05-1271: **Mitchell v. Team Financial**, 16 Neb. App. 14 (2007). Petition of appellant for further review overruled on December 12, 2007.

No. A-05-1291: **Dunn v. Wallace Sch. Dist**. Petition of appellants for further review overruled on August 29, 2007.

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No. A-05-1304: **Rose Investments v. Lobo**. Petition of appellant for further review overruled on August 29, 2007.

No. A-05-1394: **Classe v. Fitzgerald, Schorr**. Petition of appellant for further review overruled on August 29, 2007.

No. A-05-1399: **Petersen v. Lindsay Mfg. Co**. Petition of appellant for further review overruled on November 15, 2007.

No. A-05-1443: **Hall v. Hall**. Petition of appellant for further review overruled on September 20, 2007.

No. A-05-1464: **Koziol v. Koziol**. Petition of appellee for further review overruled on January 16, 2008.

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No. A-06-033: **Hoppes v. Neth**. Petition of appellee for further review overruled on October 31, 2007.

No. A-06-068: **State v. Wiese**. Petition of appellant for further review overruled on August 29, 2007.

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No. S-06-230: **DeWester v. Dundy County**. Petition of appellant for further review sustained on October 16, 2007.

No. A-06-243: **Murphy v. Brown**, 15 Neb. App. 914 (2007). Petition of appellant for further review overruled on October 12, 2007, as untimely filed.

Nos. A-06-359 through A-06-361: **Mohrmann v. Gdowski**. Petitions of appellants for further review overruled on September 20, 2007.

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No. S-06-447: **In re Interest of Kevin K.**, 15 Neb. App. 641 (2007). Petition of appellee for further review sustained on July 18, 2007.

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No. A-06-657: **State v. Stewart**. Petition of appellant for further review overruled on November 21, 2007.

No. A-06-738: **State v. Veatch**, 16 Neb. App. 50 (2007). Petition of appellant for further review overruled on December 19, 2007.

No. S-06-831: **State v. Scheffert**. Petition of appellant for further review dismissed on August 31, 2007, and judgment of the Court of Appeals of March 20, 2007, affirming judgment of the district court, is final.

No. A-06-862: **State v. Hill**. Petition of appellant for further review overruled on November 15, 2007.

No. A-06-863: **State v. Schneider**. Petition of appellant for further review overruled on November 15, 2007.

No. A-06-877: **Wild v. Wild**, 15 Neb. App. 717 (2007). Petition of appellee for further review overruled on November 21, 2007.

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No. A-06-979: **Witte v. Witte**. Petition of appellant for further review overruled on September 20, 2007.

No. A-06-998: **State v. Matthies**. Petition of appellant for further review overruled on September 20, 2007.

No. S-06-1001: **State v. Moore**, 16 Neb. App. 27 (2007). Petition of appellee for further review sustained on January 3, 2008.

No. A-06-1036: **State v. Dargeloh**. Petition of appellant for further review overruled on September 20, 2007.

No. A-06-1128: **State v. Barns**. Petition of appellant for further review overruled on January 25, 2008, as untimely filed. See rule 2F(1).

No. A-06-1164: **State v. Heil**. Petition of appellant for further review overruled on August 24, 2007, as untimely filed.

Nos. A-06-1182, A-06-1183: **State v. McSwine**. Petitions of appellant for further review overruled on August 29, 2007.

No. A-06-1193: **McKay v. Hershey Food Corp.**, 16 Neb. App. 79 (2007). Petition of appellant for further review overruled on January 16, 2008.

No. A-06-1197: **In re Interest of Mitchell H. et al**. Petition of appellant for further review overruled on August 29, 2007.

No. A-06-1201: **Trimm v. Trimm**. Petition of appellant for further review overruled on August 29, 2007.

No. S-06-1216: **State v. Stolen**, 16 Neb. App. 121 (2007). Petition of appellant for further review sustained on January 3, 2008.

No. A-06-1223: **Godsey v. Casey's General Stores**, 15 Neb. App. 854 (2007). Petition of appellant for further review overruled on September 26, 2007.

No. A-06-1232: **Ingswersen v. American Tool Cos**. Petition of appellant Irwin Industrial Tool Co. for further review overruled on November 15, 2007.

No. A-06-1235: **State v. Bartholomew**. Petition of appellant for further review overruled on July 18, 2007.

No. A-06-1240: **In re Interest of Jimmy D**. Petition of appellant for further review overruled on August 29, 2007.

No. A-06-1252: **State v. Pope**. Petition of appellant for further review overruled on August 29, 2007.

No. A-06-1301: **State v. Salinas**. Petition of appellant for further review overruled on January 3, 2008.

No. A-06-1318: **State v. Rush**, 16 Neb. App. 180 (2007). Petition of appellant for further review overruled on January 3, 2008.

No. A-06-1319: **State v. Baker**. Petition of appellant for further review overruled on August 29, 2007.

No. A-06-1334: **State v. Dober**. Petition of appellant for further review overruled on November 21, 2007.

No. A-06-1356: **Pittman v. Department of Corr. Servs**. Petition of appellant for further review overruled on January 16, 2008.

No. A-06-1357: **In re Guardianship of Charles H. & Natalya H**. Petition of appellee for further review overruled on December 12, 2007.

No. A-06-1362: **State v. Molina-Navarrete**, 15 Neb. App. 966 (2007). Petition of appellant for further review overruled on November 15, 2007.

No. A-06-1371: **In re Interest of Connor S. & Marissa T**. Petition of appellant for further review overruled on October 10, 2007.

No. A-06-1374: **Duerr v. Bohaty**. Petition of appellant for further review overruled on January 24, 2008.

No. S-06-1380: **In re Interest of Destiny A. et al**. Petition of appellant for further review sustained on July 18, 2007.

No. A-06-1382: **State v. Zesatti**. Petition of appellant for further review overruled on October 31, 2007.

No. S-06-1393: **State v. Kuhl**, 16 Neb. App. 127 (2007). Petition of appellant for further review sustained on January 24, 2008.

No. A-06-1407: **State v. Blair**. Petition of appellant for further review overruled on October 16, 2007.

No. A-06-1414: **State v. Jenkins**. Petition of appellant for further review overruled on December 12, 2007.

No. A-06-1435: **Barrett v. Fabian**. Petition of appellant for further review overruled on September 20, 2007.

No. A-06-1440: **Morales v. Swift Beef Co.**, 16 Neb. App. 90 (2007). Petition of appellant for further review overruled on December 19, 2007.

No. A-06-1446: **Sullivan v. Superior Street Family Physicians**. Petition of appellant for further review overruled on September 20, 2007.

No. A-06-1454: **Classe v. College of Saint Mary**. Petition of appellant for further review overruled on October 24, 2007.

No. A-06-1457: **State v. Roundtree**. Petition of appellant for further review overruled on August 29, 2007.

No. A-07-029: **State v. Gonzales**. Petition of appellant for further review overruled on September 20, 2007.

No. A-07-040: **State v. Sedoris**. Petition of appellant for further review overruled on September 20, 2007.

No. A-07-055: **State v. Ramirez**. Petition of appellant for further review overruled on September 20, 2007.

No. A-07-062: **State v. Hobbs**. Petition of appellant for further review overruled on August 29, 2007.

No. A-07-072: **Yelli v. Neth**. Petition of appellant for further review overruled on October 16, 2007.

No. A-07-097: **State v. Blakeman**. Petition of appellant for further review overruled on September 20, 2007.

No. A-07-098: **State v. Cruz**. Petition of appellant for further review overruled on December 19, 2007.

No. A-07-106: **Timothy T. v. Shireen T.**, 16 Neb. App. 142 (2007). Petition of appellant for further review overruled on January 24, 2008.

No. A-07-123: **Martin v. Lanphier**. Petition of appellant for further review overruled on August 29, 2007.

No. A-07-135: **Fittro v. Fittro**. Petition of appellant for further review overruled on January 16, 2008.

No. A-07-140: **State v. Roberts**. Petition of appellant for further review overruled on October 31, 2007.

No. A-07-143: **Hendrix v. Sivick**. Petition of appellant for further review overruled on October 24, 2007.

No. A-07-148: **State v. Wills**. Petition of appellant for further review overruled on July 18, 2007.

No. A-07-163: **City of Omaha v. Tract 1**. Petition of appellant for further review overruled on August 29, 2007.

No. A-07-164: **City of Omaha v. Tract No. 3**. Petition of appellant for further review overruled on August 29, 2007.

No. A-07-196: **State v. Hansen**. Petition of appellant for further review overruled on October 24, 2007.

No. A-07-200: **Sherrod v. State**. Petition of appellant for further review overruled on October 24, 2007.

No. A-07-201: **In re Interest of Kolt S. & Ariel R**. Petition of appellee State for further review overruled on November 15, 2007.

No. A-07-205: **City of Omaha v. Tract No. 3**. Petition of appellant for further review overruled on August 29, 2007.

No. A-07-208: **Velehradsky v. Velehradsky**. Petition of appellant for further review overruled on November 21, 2007.

No. A-07-214: **State v. Rott**. Petition of appellant for further review overruled on November 21, 2007.

No. A-07-234: **In re Estate of Carlson**. Petition of appellant for further review overruled on September 12, 2007.

No. A-07-235: **State v. Troyer**. Petition of appellant for further review overruled on September 20, 2007.

No. A-07-238: **In re Interest of Harrison H**. Petition of appellant for further review overruled on January 24, 2008.

No. A-07-238: **In re Interest of Harrison H**. Petition of appellee Todd H. for further review overruled on January 24, 2008.

No. A-07-241: **State v. Standley**. Petition of appellant for further review overruled on August 29, 2007.

No. S-07-256: **State v. Brauer**, 16 Neb. App. 257 (2007). Petition of appellant for further review sustained on January 24, 2008.

No. A-07-277: **State v. Latzel**. Petition of appellant for further review overruled on September 12, 2007.

No. A-07-280: **Bellevue Rod & Gun Club v. Sarpy Cty. Bd. of Equal**. Petition of appellant for further review overruled on January 16, 2008.

No. A-07-281: **In re Interest of Naif A. et al**. Petition of appellant for further review overruled on November 15, 2007.

No. A-07-291: **State v. Burkhardt**. Petition of appellant for further review overruled on January 3, 2008.

No. A-07-307: **Neilan v. Neilan**. Petition of appellant for further review overruled on December 12, 2007.

No. A-07-310: **In re Interest of Jeff D**. Petition of appellant for further review overruled on October 31, 2007.

No. A-07-311: **In re Interest of Mindy D**. Petition of appellant for further review overruled on October 31, 2007.

No. A-07-350: **State v. Balash**. Petition of appellant for further review overruled on December 12, 2007.

No. A-07-356: **Williams v. Neth**. Petition of appellant for further review overruled on January 16, 2008.

No. A-07-362: **In re Interest of Lauren B**. Petition of appellant for further review overruled on November 21, 2007.

No. A-07-369: **State v. Poole**. Petition of appellant for further review overruled on January 3, 2008.

No. A-07-400: **State v. Barber**. Petition of appellant for further review overruled on September 20, 2007.

No. A-07-405: **State v. Hightower**. Petition of appellant for further review overruled on November 15, 2007.

No. A-07-408: **Spotanski v. Willyard**. Petition of appellant for further review overruled on October 31, 2007.

No. A-07-427: **In re Interest of Tyler L. & Alyssa L**. Petition of appellant for further review overruled on October 31, 2007.

No. S-07-447: **Jefferson v. State**. Petition of appellant for further review overruled on October 30, 2007.

No. A-07-451: **Feld Invest. Co. v. Valley West Apartments**. Petition of appellants for further review overruled on August 29, 2007.

No. A-07-461: **State v. Guerrero**. Petition of appellant for further review overruled on October 31, 2007.

No. A-07-466: **In re Interest of Tyler N. et al**. Petition of appellant for further review overruled on December 12, 2007.

No. A-07-473: **Waite v. Carpenter**. Petition of appellant for further review overruled on October 31, 2007.

No. A-07-478: **State v. Gutierrez-Pizano**. Petition of appellant for further review overruled on January 24, 2008.

Nos. A-07-487 through A-07-489: **State v. Gooch**. Petitions of appellant for further review overruled on December 19, 2007.

No. A-07-513: **In re Interest of Justice S. et al**. Petition of appellant for further review overruled on July 20, 2007, as untimely filed.

No. S-07-519: **Freeburger v. Department of Motor Vehicles**. Petition of appellant for further review sustained on January 16, 2008.

No. A-07-520: **Hokom v. Neth**. Petition of appellant for further review overruled on December 19, 2007.

No. A-07-549: **In re Interest of Morraghan J**. Petition of appellant for further review overruled on December 19, 2007.

No. A-07-581: **State v. Hansen**. Petition of appellant for further review overruled on November 27, 2007.

No. S-07-582: **Metropolitan Utilities Dist. v. Liberty Dev. Corp**. Petition of appellant for further review sustained on December 12, 2007.

No. A-07-590: **State v. Mudloff**. Petition of appellant for further review overruled on January 16, 2008.

No. A-07-597: **State v. Greenwood**. Petition of appellant for further review overruled on November 15, 2007.

No. A-07-607: **State v. Rideout**. Petition of appellant for further review overruled on November 15, 2007.

No. A-07-621: **State v. Meyer**. Petition of appellant for further review overruled on January 3, 2008.

No. A-07-624: **State v. Sinner**. Petition of appellant for further review overruled on January 16, 2008.

No. A-07-651: **Clayton v. Warford**. Petition of appellant for further review overruled on October 10, 2007.

No. A-07-653: **State v. Chae**. Petition of appellant for further review overruled on January 16, 2008.

No. S-07-656: **Norby v. Farnam Bank**. Petition of appellant for further review sustained on August 29, 2007.

Nos. A-07-666, A-07-667: **State v. Clinesmith**. Petitions of appellant for further review overruled on January 24, 2008.

No. A-07-674: **State v. Dvarro**. Petition of appellant for further review overruled on October 16, 2007.

No. A-07-695: **State v. Johnson**. Petition of appellant for further review overruled on January 3, 2008.

No. A-07-696: **State v. Drewes**. Petition of appellant for further review overruled on December 12, 2007.

No. A-07-708: **Clarke v. Dodge Cty. Bd. of Equal**. Petition of appellant for further review overruled on September 20, 2007.

Nos. A-07-716, A-07-717: **State v. McCormick**. Petitions of appellant for further review overruled on January 25, 2008, as untimely filed. See rule 2F(1).

No. A-07-744: **State on behalf of McCowin v. Wells**. Petition of appellant for further review overruled on October 12, 2007, as untimely filed.

No. A-07-750: **In re Interest of Kyle S**. Petition of appellant for further review overruled on January 16, 2008.

No. A-07-783: **State v. Sunday**. Petition of appellant for further review overruled on January 18, 2008.

No. A-07-826: **Hawks v. Williamson**. Petition of appellant for further review overruled on September 24, 2007.

No. A-07-851: **State v. Dockery**. Petition of appellant for further review overruled on October 31, 2007.

No. A-07-940: **In re Interest of Antoine G**. Petition of appellant for further review overruled on January 16, 2008.

No. A-07-956: **In re Interest of Al-Brion L. & Brivaughn L**. Petition of appellant for further review overruled on December 28, 2007, as filed out of time.

No. A-07-1190: **Flemons v. City of Omaha**. Petition of appellant for further review overruled on January 25, 2008, as untimely filed.

Nebraska Supreme Court

In Memoriam

Justice Harry Spencer

Nebraska Supreme Court Courtroom
State Capitol
Lincoln, Nebraska
October 16, 2007
3:00 p.m.

Proceedings before:
SUPREME COURT
Chief Justice Michael G. Heavican
Justice John F. Wright
Justice William M. Connolly
Justice John M. Gerrard
Justice Kenneth C. Stephan
Justice Michael McCormack
Justice Lindsey Miller-Lerman

Proceedings

CHIEF JUSTICE HEAVICAN: Good afternoon to everyone. The Nebraska Supreme Court is meeting in special session on this 16th day of October, 2007, to honor the life and memory of former Supreme Court Justice Harry Spencer and to note his many contributions to the legal profession.

I would like to take this opportunity to introduce you to my colleagues on the Supreme Court. Beginning at the far left is Justice Miller-Lerman. Justice Kenneth Stephan is next to Justice Miller-Lerman, and next to Justice Stephan is Justice William Connolly. To my far right is Justice Michael McCormack. Next to Justice McCormack is Justice John Gerrard, and to my immediate right is Justice John Wright.

The Court further acknowledges the presence of Justice Spencer's family and I will introduce some of you now, and you may stand. First of all, granddaughter, Stephanie Harlan Skrupa. And why don't you all just remain standing for a minute. Frank Skrupa, also, her husband; Leone Spencer Harlan, also a daughter; Terry Spencer, son; and Pat Spencer, the wife of Terry Spencer; Bob Patterson and Mavis Patterson, that would be son's brother-in-law and sister-in-law, according to my information; Scott Spencer, grandson; and Danielle Spencer, wife of Scott. And that's all the family members I have listed. If there are other family members —

MS. SUNDQUIST: Your Honor, I'm Amanda Sundquist, Judge Spencer's great-granddaughter.

CHIEF JUSTICE HEAVICAN: Great. Thank you very much. Anybody else from the family?

You may all be seated, and thank you so much for honoring us with your presence here today.

The Court also acknowledges the presence of other members of the family and friends of former Supreme Court Justice Spencer.

Also present are former members of the Nebraska Supreme Court, members of the Nebraska Court of Appeals, and other members of the judiciary, and members of the bar.

At this time, the Court recognizes former Nebraska Supreme Court Chief Justice C. Thomas White. He is the Chairman of the Supreme Court's Memorial Committee, and he will conduct the proceedings for us today.

Good afternoon, Mr. Chief Justice White.

CHIEF JUSTICE WHITE: May it please the Court, it's my honor to be chair again of a committee to — and I'm not sure about the — how long I — what time I might not be here myself in a different capacity. I had the honor of serving with Harry Spencer from 1977, when I was appointed, to 1979 when he retired. Although there are others who have served with him or know him well, and the first of these speakers, I should like to introduce, Mr. Charles Thone, our former Governor of the State of Nebraska.

Governor Thone.

CHIEF JUSTICE HEAVICAN: Governor Thone, good afternoon.

GOVERNOR THONE: Chief Justice Heavican, members of the Court, may it please the Court, you know, it was George Bernard Shaw who once wisely opined that no remarks from an ex-governor at a judicial setting such as this are all that bad, if they're short enough. So as I like to say in lieu of any brilliance or profundity, I'll confine myself to some brevity here today. But the good Judge asked his granddaughter to see that I came today and offered some remarks, so I like to think that that was probably the last unwise order of the Harry Spencer Court.

As has been documented here and there, Judge Harry Spencer graduated magna cum laude from the Nebraska Law School. And then he later lectured there, a course in Wills and Probate. He was, as I recall, Lancaster County Judge at the time.

I thought I'd kind of take a little different approach. We've got Professor Gradwohl here. He can talk about the academic side. And we've got former Chief Justice Bill Hastings here. He was associated closely with the Judge on the bench. My initial association with Professor Harry Spencer was a little unusual. As I indicated, he taught this course in Wills and

Probate, and my first introduction to him came in 1946. For you math majors, that's about 61 years ago.

I, at the time, was a somewhat bright and bushy-tailed freshman at the Law School. And to be honest, in contrast to the good Judge, I was a magna cum laude goof-off of some respects as far as diligent law school standards were concerned. I was kind of totally involved in campus politics, Inter-fraternity Council, and extra-curricular activities over there, and even some field trips we took occasionally to Omaha or Kansas City, and even New Orleans.

My personal big problem at the time with this Spencer Wills and Probate course was that it was taught on Saturday morning at 10:00. Maybe some of you remember. Well, my weekend at that time, usually started about Thursday at about 5:00 or 6:00, and this was, again, you've got to remember, after the Big War. For the uninitiated to know, that was World War II. And we returned veterans were, we thought, quite worldly wise. We just weren't about to let law school interfere with our extended social life and our overall college education. Well, typical of my academic discipline at the time, I went to the first couple classes and then I skipped two, or three, or four in a row. And as [Professor] Gradwohl will really remember, Judge Spencer was meticulous in roll calls, and he noticed my absence after about the fourth week or so. And he glared down at the class one Saturday morning and he said, "Now, if any of you here know or are a friend of this Charles Thone, that's T-h-o-n-e," and he rang it a couple, three times, "let him know that if he doesn't start showing up here and misses one more class before the semester's over, I'm going to flunk him with the worst grade I can give him." Well, two classmates came over to the Phi Gam house to consult with me a little and deliver the Spencer ultimatum, Roy Sheaff, maybe some of you knew Roy, of course, and Dean Kratz.

Well, the next Saturday, I was there bright and early, and I'd gotten the message loud and clear, and I never missed another of his classes. But as Paul Harvey might say, "Here's the rest of the story."

The first time I showed up, the Judge looked down at me and glared and said, "Well, it's sure nice that Mr. Thone would

spend some of his valuable weekend with us. Would he please stand up and recite for the class here the first assigned case today." Well, of course, I wasn't totally prepared, which he let me know rock right, and although at the end, he kind of was upbeat about it.

Well, this went on for the rest of the semester. The first case recitation all the time was "Mr. Thone will now stand up and recite this case for us." Well, you know, I got kind of smart. I thought, "Well, you know, I'll just read that first case and, boy, I'm all set here." Well, about the third time, he said, "Well, we're going to change the order of the cases a little today and Mr. Thone will review for us the last assigned case." Well, evidently he'd done me a little bit of a favor, because I ended up getting an awful good grade in the exam.

But years later, I talked with him about this. And he looked me right in the eye and he said, "Well, some of you G.I. Bill guys weren't at all appreciative and totally understanding of this U.S. Government-paid and this very short three years, this great opportunity that you all have here in law school. And he says, "I hope I motivated a few of you to straighten up and fly right. Charley," he said, and I remembered this forever, "by the time you really learn how to make the most of life, the most of life is gone." And of course, he was absolutely right.

Years later when I was governor, actually 30 years later as I recall, Judge Spencer was quite often, along with our excellent Attorney General at the time, Paul Douglas, my unofficial advisors on judicial appointments across the board. Now, Paul — and you all know Paul pretty well, he was kind of open and above-board about it. The Judge was much more discreet. But I can assure you, he got his oar in on every one of them with me personally. And frankly, I was helped considerably by it. Judge Spencer knew the judiciary as well as any judge or lawyer in the state, and, of course, Paul Douglas knew the bar awfully well, too.

Later on, when I was out of office, we had a money management group that met in my basement every Wednesday night for years. The Judge never missed a session when he was in town. Now, some of you might equate that money management group with just an old style poker game. That's what it was. In

those years, if there was ever a dispute on anything, all eyes turned to the good Judge. He was our most popular member, and his words settled the issue. There was never, ever a successful appeal of record, I assure you.

Judge Harry Spencer looked like a judge, that curly white hair, kind of rotund. He deeply felt that he honored and that he was honored by the law. He was a superlative student. You all knew that. And he honored the law with high distinction.

He especially enjoyed civic and fraternal work, and he was especially good at it. In my opinion and in the opinion of many others, Nebraska today is a better place because this native of Waltham, England, lived and worked his long adult life here in Nebraska. His three daughters, his three sons, his 13 grandchildren, his 23 great grandchildren, and his one great-great grandchild should be very proud, indeed, of their grand-grand-daddy, the Good Judge Harry Spencer. As they say, he was special. He was a keeper.

Thank you members of the Court, very much.

CHIEF JUSTICE HEAVICAN: Thank you, Governor Thone.

(The following remarks were submitted by former Chief Justice Norman Krivosha who was unable to attend the ceremonial session of the Supreme Court.)

CHIEF JUSTICE KRIVOSHA: May it please the Court, Mr. Chief Justice and Honorable Members of this Court, to be asked to participate in a memorial service for a departed colleague and friend is most often a bittersweet experience. To have been asked to participate when so many more are available and far more qualified is indeed a great honor; yet to have to participate is of deep sadness. It is with such bittersweet feelings that I now participate in a memorial service for our departed former brother on the Court, Judge Harry A. Spencer.

For many, myself included, it seemed as if such an occasion could not ever occur. It seemed for sure that this man of many talents would go on forever, as indeed we hoped he would. Born in 1903 in Bishops Waltham, England, he lived to the incredible age of nearly 104. But it was not just that he had longevity. With that he remained strong of mind and body.

I vividly recall attending his 100th birthday where, dressed in his best, he greeted each of us fully cognizant of who we were and where in his life we had been, even though he may not have seen us for a long time. One by one, as we passed his chair, he acknowledged us, sharing with some of us his current activities, including the fact that he had not lost either his love for, or his knowledge of, poker.

The lives of Judge Spencer and Norman Krivosha crossed many times over the years. While he was still a county judge, I was one of his students in the Wills and Estates course he taught at the University of Nebraska Law School. We learned not only the black letter law, but the way to do it. His may have been the first clinic taught in Law School, simply by reason of his combining the law of the textbook and statutes with the practical knowledge of his courtroom.

As he advanced to the District Court bench and I advanced to the real practice of law, we spent many times together. I specially recall his having appointed me to represent a young man charged in district court with theft. At the sentencing, I had succeeded in locating several uncles who lived in Arkansas, who drove all night to be in court for the sentencing. Recognizing that perhaps all this young man needed was someone who cared about him, he put the young man on probation to the uncles in Arkansas. He had the combination of a no-nonsense but compassionate jurist.

It was therefore with some pleasure that upon being appointed Chief Justice of this honorable Court, I should find Judge Spencer presiding as Chief Justice pro tem. He was extremely helpful and thoughtful to me, and I was most grateful to him for it. Wherever I might travel during the years on the Court and advise that I was from Nebraska, some judge who had attended the National Appellate Judges Conference would inquire about Judge Spencer. He was known throughout the country and today the educational program of the National Appellate Judges Education Program is named in his honor.

He lived a long life. But much more than that, he lived a full life and we are a better place because he passed this way.

CHIEF JUSTICE WHITE: May it please the Court, the next speaker is an academic, Professor John Gradwohl of the

University of Nebraska, was well acquainted with Harry, his scholarship and his study habits.

[Professor] Gradwohl.

CHIEF JUSTICE HEAVICAN: Good afternoon, Professor Gradwohl.

PROFESSOR GRADWOHL: May it please the Court, I am John Gradwohl, very proudly the Judge Harry A. Spencer Professor of Law at the University of Nebraska Law College. The Professorship and a study room in the library of the Law College were established by his daughter and son-in-law, Lee and the late Neal Harlan, in recognition of Judge Spencer's special interests and achievements in the areas of legal and judicial education.

Judge Spencer graduated from the University of Nebraska Law College in 1930 with the highest academic honors given at that time. He had worked in banking before deciding on a career in law. When my classmates and I arrived at the Law College, in 1949, Judge Spencer had been a lawyer for a decade-and-a-half and a county judge for four years. He taught the Wills course at the Law College from 1942 until 1961, his first year as a Justice of this Court, with a couple of years out when the college was closed during World War II. Each of today's speakers was a student at the Law College when Judge Spencer taught the Wills course.

Now, this was just a two-credit course, but it involved a lot of work. The statutes were a jumble, having been cobbled together from the territorial days. Probate practice, as you know, varied greatly throughout Nebraska's 93 counties. The authority of executors and administrators stemmed largely from orders of the Court, so Judge Spencer had acquired an intimate familiarity with all aspects of probate practice, testamentary trusts, and guardianships from intense daily involvement as a supervising judge. There were no "Cliff's Notes," other study aids, computers, or even suitable textbooks available for the Wills course at that time.

Judge Spencer approached the teaching of Wills with the same vigor and in the same rapid speed that he climbed the treacherous steps of Memorial Stadium. Each stair would be dealt with, a direct route would be followed, and no time was

to be wasted. Daily assignments could run more than 15 or 20 items, and the total course assignments probably ran more than 2,000 pages, that is, if a student could find all of the cases and other library books involved in the assignments and if the relevant pages were not too tattered to be read easily.

I'm not sure I believe all of former Governor Thone's statements about his preparation for the Wills course, because I don't think he could ever find all of the materials that Judge Spencer had assigned and we had to go find in the hard covers with all the dust and all in a library that just had limited numbers of copies of these books. The legend was that Judge Spencer had examined cover to cover all of the 150 or so volumes of the Nebraska Reports that there was at that time to find everything related to the law of wills and estates.

Judge Spencer had become a District Judge by the time my class took his Wills course. Vern Hansen, who went on to practice law in Gering; David Downing, who practices in Superior and was a Nebraska State Bar president; and I were enlisted to help Judge Spencer prepare course materials for the Wills course. In addition to all of his other activities, he put together a really excellent collection of commentary, cases, problems, questions, and forms in 415 single-spaced mimeographed pages. The Wills course was still demanding. Judge Spencer was in the forefront of legal education of the time in his preparation of these course materials. There just weren't materials of this sort that were available any place in the country. And additionally, he was far ahead of the times in his understanding and application of probate law.

Judge Spencer's Wills course materials not only helped to standardize probate practice throughout the state, but served as a valuable research vehicle in the 1970s when Nebraska looked at and then adopted the Uniform Probate Code, which was proposed by the National Conference of Commissioners on Uniform State Laws. That Code established the more modern system throughout the country, which actually resembled much of what Judge Spencer had previously taught and done as proper practice and proper policy.

Judge Spencer stopped teaching the Wills course shortly after he became a Supreme Court Justice, but he soon became

enmeshed in American Bar Association activities which led to the development of major national judicial education programs. He'd previously been President of the Lincoln Bar Association and Vice-president and Executive Committee member of the Nebraska State Bar Association.

In the early 1960s he held several key positions, including member of the Executive Committee in what was then the Judicial Administration Section of the American Bar Association. As the Judicial Administration Section evolved into a Judicial Division, Judge Spencer was one of the founders of the Appellate Judges Conference that was established in 1964. And remember, that's just three years after he joined this Court, so he didn't waste a moment in his continuing interest throughout his career at the legal education, and then to judicial education.

Judge Spencer became a pioneer of the educational programs within the Appellate Judges Conference. His name became synonymous with judicial education. Nebraskans active in the American Bar Association were routinely asked, "Do you know Judge Spencer?"

Today the Appellate Judges Conference has a number of continuing education programs. The first of these programs that the Appellate Judges Conference established continues to honor Judge Spencer, the Spencer-Grimes Seminar for Federal and State Appellate Judges. It was established in 1968 when Judge Spencer was Chairman of the Appellate Judges Conference. Justice William Grimes was a long-time New Hampshire Supreme Court Judge who was active in arranging of the inaugural full-scale national program designed expressly for appellate judges. The Chief Justices, Your Honor, would not let the appellate justices go to meetings at the Conference of Chief Justices, so this is one reason prompting Judge Spencer to help form the Conference of Appellate Judges, which exists today.

The Spencer-Grimes program is now well-established and endowed at the SMU Dedman School of Law in Dallas and holds programs at a variety of locations. Last month, the Spencer-Grimes program participated in a four-day major Appellate Judges Education Institute in Washington, D.C. The

program included participation by the Supreme Court of the United States and dealt with many of the country's most important current judicial issues.

Judge Spencer remained a personal friend of the almost 20 years of Nebraska law students for whom he'd been a professor, but he never completely shed that role of professor with his former students. I take it from Governor Thone's remarks today that that included governors as well as the rest of the world. His discussions of the law with former students were likely to be a professional line of questioning, "Have you considered this issue?" Or, "Have you considered this statute or this case?" Now, perhaps Judge Spencer would rule on money issues in Governor Thone's basement, but when some of us talked with him about the Uniform Probate Code, he reverted to his professorial role and he would not express an opinion. He would only say, "Have you thought about . . ." and invariably we had not thought as fully about that issue as we should have.

As a trial judge, Judge Spencer had a reputation for running a tight courtroom, being in charge, and ensuring that proper procedures were meticulously followed. When he became a Supreme Court Settlement Conference judge after retiring as an active Justice in 1979, he was tremendously successful in getting the parties to settle cases even after a district court decision. He thoroughly understood the legal issues and the worth of the litigation, and his reputation was that he had no hesitation in expressing his views clearly and forcefully to the lawyers involved. His professional demeanor, when called upon, was that of gentle encouragement for the learner to do it in his or her own way with just enough assistance from him to enable the learner to accomplish the task. As a Settlement Conference Justice, I think that he enjoyed a different reputation.

Judge Spencer was able to enjoy one accomplishment not achieved by any other University of Nebraska professor or Supreme Court Justice. He celebrated his 100th birthday by inspiring a Cornhusker football victory in a cameo appearance from the special balcony at Memorial Stadium. Thank you.

CHIEF JUSTICE HEAVICAN: Thank you, Professor Gradwohl.

CHIEF JUSTICE WHITE: May it please the Court, our last speaker is Chief Justice William Hastings, who succeeded Judge Spencer to the District Court and then took over his seat when Justice Spencer retired. May I introduce Chief Justice William C. Hastings?

CHIEF JUSTICE HEAVICAN: Thank you. Good afternoon Chief Justice Hastings.

CHIEF JUSTICE HASTINGS: Mr. Chief Justice, members of the Court, may it please the Court, the problem with going last is most everything you've written down to say has been said, but I can't edit that quickly, so I'll just read what I've wanted to say.

Harry Spencer was an uncommon man. The fact that he lived for almost 104 years is uncommon in and of itself. He was elected to the Supreme Court of Nebraska in 1961 and served with distinction until his retirement in 1979. I was privileged to succeed him on this Court.

He was born in England, but lived most of his life in the United States. He attended South High School in Omaha, the University of Nebraska, and University of Nebraska College of Law. After practicing law in Lincoln for a number of years, he was elected to the County Court and served there until his election to the District Court in 1952, where he served until 1961. He was deeply devoted to the law, and as has been previously stated, he was active in the affairs of the State Bar Association as well as American Bar Association. He was one of the founders of the Appellate Judges Conference Educational Program and that program is now named in his honor. He was a regular lecturer at those meetings for a number of years.

Judge Spencer — and this sounds like Governor Thone's experience, but it's mine, too. Judge Spencer taught Wills and Probate at the Nebraska College of Law. I took his course and remember very well that he called on me to recite a case on a Monday following a weekend at home when I had gone pheasant hunting. I had not read the case and had to report that to him. Even though we were fraternity brothers, he called on me for the next six classes and fortunately, I had read all of the cases.

Harry was not one dimensional. He participated in the activities of the Lincoln Council of Churches, the Boy Scouts, Kiwanis, YWCA, and was the first judicial representative on the Board for the Nebraska State Retirement System.

His greatest love outside of the law had to be the Masonic Lodge including all of its bodies. He was Master of his local lodge, Grand Master of Masons in Nebraska, Potentate of the Shrine and a 33rd Degree Scottish Rite Mason. He devoted half or more of his life to the Nebraska Masonic Home in Plattsmouth. He was appointed to the board in 1941 and served until 2004. By reason of his dedicated service, there is a new 24-hour nursing care wing, which was added in 1989 and was appropriately named the Spencer Wing. Harry lived out the remainder of his life at that home.

Mary C. Stapp, Executive Director of the Masonic Home wrote the following: "The employees at the Masonic Home, in every department, had the utmost respect for Judge Harry Spencer. Harry always showed an interest in the employees as individuals and truly cared and respected each of them for the work they carried out on a day-to-day basis. Harry was always a perfect gentleman, as he was his entire life, and freely expressed his appreciation to everyone who attended to his needs. Harry's genuine sincerity, kind nature, and humbleness left the employees in awe." End of quote. Thank you very much.

CHIEF JUSTICE HEAVICAN: Thank you, Chief Justice Hastings.

CHIEF JUSTICE WHITE: The program says that I shall give a few personal remarks. I served with Judge Spencer. As you know, at the time that I joined him, the Constitution of the State of Nebraska and the Constitution of the United States was in great and exciting flux. The rights of prisoners before the Court were being expanded or sometimes retreated, sometimes restrained. And during these conferences with formidable members of the Court like Judge Paul White, Judge Hale McCown, Les Boslaugh, Don Brodkey, the discussions were formidable, polite, courteous, and instructive. Judge Spencer was formidable, a good solid student of the law. His reasoning was persuasive. Sometimes, I did not always agree, but I

always found it formidable. I am pleased to add my voice of a good man, a fine judge, who honored the State of Nebraska by his service. Thank you, Your Honor.

CHIEF JUSTICE HEAVICAN: Thank you, Chief Justice White.

I want to note that among the dignitaries with us here today is Lieutenant Governor Rick Sheehy. And I take this final opportunity to note for those present that this entire proceeding has been memorialized by the Court. After these proceedings have been transcribed, the text will be uploaded to the Supreme Court's website and copies will be distributed to the family members and those of you who have spoken on behalf of Justice Spencer. We will also forward a copy of the transcription to West Publishing for inclusion in its Northwest Reporter.

On behalf of the Nebraska Supreme Court, I extend its appreciation to Former Chief Justice C. Thomas White who chaired the Court's Memorial Committee, and also again thank you for all of the presenters here today.

This concludes the special ceremonial session of the Nebraska Supreme Court. The Court would encourage any of the participants, family members and friends of Justice Spencer to remain in the courtroom for a moment to greet each other on this occasion. The Court will also come down and mingle with you. I thank you all for attending. We are adjourned.

(Ceremonial session adjourned at 3:40 p.m.)

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

BARBARA L. POPPE, PERSONAL REPRESENTATIVE OF THE ESTATE OF HEATHER A. POPPE, DECEASED, APPELLANT, V. ROBIN F. SIEFKER, APPELLEE.

735 N.W.2d 784

Filed July 27, 2007. No. S-05-670.

1. **Motions for New Trial: Appeal and Error.** A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion.
2. **Judges: Words and Phrases.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through the judicial system.
3. **Damages: Appeal and Error.** The amount of damages to be awarded is a determination solely for the fact finder, and the fact finder's decision will not be disturbed on appeal if it is supported by the evidence and bears a reasonable relationship to the elements of the damages proved.
4. **Motions for New Trial: Juror Misconduct.** An application for new trial may properly be based upon allegations of misconduct of the jury.
5. **Motions for New Trial: Juror Misconduct: Proof.** In a motion for new trial, allegations of misconduct by jurors must be substantiated by competent evidence.
6. **Motions for New Trial: Juror Misconduct: Verdicts.** In a motion for new trial based on juror misconduct, the misconduct complained of must relate to a disputed matter that is relevant to the issues in the case and must have influenced the jurors in arriving at the verdict.
7. **New Trial: Jury Misconduct: Proof.** In order for a new trial to be ordered because of juror misconduct, the party claiming the misconduct has the burden to show by clear and convincing evidence that prejudice has occurred.
8. **Evidence: Proof: Words and Phrases.** Clear and convincing evidence is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved.
9. **Jury Misconduct: Proof.** Extraneous material or information considered by a jury may be deemed prejudicial without proof of actual prejudice if the material or information relates to an issue submitted to the jury and there is a reasonable possibility that the extraneous material or information affected the verdict to the detriment of a litigant.

10. **Jury Misconduct: Appeal and Error.** The trial court's ruling on a question involving jury misconduct will not be disturbed on appeal absent an abuse of discretion.
11. **Wrongful Death: Damages.** A plaintiff in an action for wrongful death of a child may recover damages for loss of the deceased's society, comfort, and companionship which are shown by the evidence to have a pecuniary value.
12. ____: ____. In a parent's action for wrongful death of a child, parental loss is not limited to or necessarily dependent upon deprivation of the child's monetary contribution toward parental well-being.
13. ____: ____. In a wrongful death action, damages on account of mental suffering or bereavement or as solace to the next of kin on account of the death are not recoverable.
14. **Damages: Appeal and Error.** An award of damages may be set aside as inadequate when, and not unless, it is so inadequate as to be the result of passion, prejudice, mistake, or some other means not apparent in the record.
15. **Damages.** If an award of damages shocks the conscience, it necessarily follows that the award was the result of passion, prejudice, mistake, or some other means not apparent in the record.

Appeal from the District Court for Lancaster County: PAUL D. MERRITT, JR., Judge. Affirmed.

Robert R. Moodie, of Friedman Law Offices, for appellant.

Cathy S. Trent-Vilim, of Wolfe, Snowden, Hurd, Luers & Ahl, L.L.P., for appellee.

WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

GERRARD, J.

NATURE OF CASE

Heather A. Poppe was killed in an automobile accident when her car was struck by a car driven by Robin F. Siefker. Barbara L. Poppe, as personal representative of Heather's estate, filed a wrongful death lawsuit against Siefker. The only issue tried to the jury was the extent of the damages. The jury returned a verdict in favor of the estate for a total sum of $46,925.60. Following the trial, the court staff found in the jury deliberation room a "Personal Financial Slide-Calculator" and an inflation rate written on a "Post-it" note. The estate filed a motion for a new trial, asserting jury misconduct and inadequacy of the damage award. The district court denied the motion. The estate now appeals from the judgment and order of the district court denying the motion for new trial.

BACKGROUND

Heather A. Poppe (Heather) was killed in an automobile accident on November 28, 2002. Heather had been driving west on Interstate 80 when her vehicle was struck head on by a car driven by Siefker while he was driving east in the westbound lane. Barbara L. Poppe (Barbara), Heather's mother, brought a wrongful death lawsuit on behalf of the estate against Siefker. At trial, Siefker admitted the accident was caused by his negligence. The only issue tried to the jury was the extent of the damages.

Heather was adopted by Arthur Poppe (Arthur) and Barbara in 1983, less than 3 days after she was born. Heather was raised in Kearney, Nebraska, in the same residence where Arthur and Barbara currently live. Heather graduated from high school in 2001 and moved from Kearney to Milford, Nebraska, where she began attending classes in automobile body repair at the Milford campus of Southeast Community College. Along with going to school full time, Heather worked Monday through Friday at a fast-food restaurant in Lincoln, Nebraska, and worked at another fast-food restaurant in Kearney on the weekends. Even though Heather was attending school on scholarship, Barbara testified that they had to take out additional school loans to cover some of her expenses. On occasion, Heather's parents would also help her pay other bills.

Although Heather was attending school in Milford, she stayed in frequent contact with her family in Kearney. Barbara testified that she talked to Heather on the telephone, usually every day, and would occasionally drive to Milford to see Heather. Barbara also testified that Heather would come home to Kearney every weekend. It is undisputed that Heather had a loving and caring relationship with her parents.

The record, however, also reflects that Heather had a boyfriend in Kearney whom she had been dating for a number of years. Heather's boyfriend had a daughter from another relationship who, at the time of trial, had just turned 6 years old. Barbara testified that at the same time that Heather was maintaining a relationship with her boyfriend, she was building a relationship with her boyfriend's daughter. Heather would spend

time with her boyfriend and his daughter on the weekends when she was not working.

The evidence further reveals that as Heather became older, she decided she wanted to reconnect with her biological parents. Heather's biological father lives in Fremont, Nebraska, with his current wife, and Heather's biological mother lived in Omaha, Nebraska, but later moved to Alabama. Heather would talk on the telephone with her biological father and would spend time with him as often as their schedules would allow. Heather also began corresponding with her biological mother. While her biological mother was living in Omaha, Heather would frequently visit her on weekends. After her biological mother moved to Alabama, Heather would travel there to visit.

Evidence was also presented at trial relating to the health conditions of Heather's parents. Barbara testified that she recently suffered from a "medical emergency related to a blood clot" that blocked the flow of blood to her liver. As a result of this condition, she spent 2 weeks in the hospital and remains on blood thinners. At the time of trial, the blood clot had not been dissolved. Barbara testified that doctors are "very cautiously making sure that everything is smooth where that is concerned, because if it compromises again, it could cost [her her] life."

In July 1999, Arthur suffered a heart attack that left him with "less than half a functioning heart" and "has had repeated close calls since." As a result of the heart attack, Arthur has had seven stents inserted in his body to help restore the blood flow. Arthur testified that on bad days, he suffers from shortness of breath and chest pain. Arthur has been told by doctors that his heart condition is not going to improve.

At the close of all the evidence, the estate moved for a directed verdict on its claim for funeral and burial expenses. The motion was granted, and the district court directed a verdict in the estate's favor for $6,925.60 on this claim. The court then proceeded to instruct the jury on the estate's claim for damages on behalf of Heather's parents for loss of consortium, services, society, companionship, and counsel resulting from the death of their daughter. With regard to calculating the

present value of any damages, the jury was given instruction No. 8 which stated:

> If you decide the Estate of Heather A. Poppe is entitled to recover damages for any future losses, then you must reduce those damages to their present cash value. You must decide how much money must be given to the estate today to compensate it fairly for future losses.

The case was then submitted to the jury which returned a verdict in favor of the estate for $40,000 regarding the claim on behalf of Heather's parents. Accordingly, judgment was entered by the court in favor of the estate for the total sum of $46,925.60.

Following receipt of the verdict and discharge of the jury, the court staff was cleaning the jury deliberation room and found an item labeled "Personal Financial Slide-Calculator." Attached to the personal financial slide calculator was a "Post-it" note which contained a handwritten inflation rate of 3.5 percent, averaged over 23 years. The court contacted counsel for both parties, marked these items collectively as exhibit 4, and, on its own motion, received them into evidence.

The personal financial slide calculator is divided into three separate sections, each of which performs different calculations. The user adjusts the figures in the calculation by moving an insert. The first section is entitled "One-time investment" and allows the user to calculate the amount of income that will be reinvested monthly on an initial investment based on the number of years invested and the rate of return. This section contains figures for initial investments of $1,000, $10,000, $25,000, and $50,000 over a period ranging from 5 to 25 years, and invested at hypothetical return rates of 6, 8, 10, and 12 percent. The second section is entitled "Initial investment with additional monthly investments." This section performs the same calculations as the first section, using the same initial investment figures and rates of return, except this section calculates the total return based on the assumption that the user is making additional monthly investments of either $100 or $250. The third section is entitled "Retirement income investment." This section allows the user to determine the number of years

a total investment will last based on a range of monthly withdrawals and various rates of return.

The estate filed a motion for new trial, asserting jury misconduct and inadequacy of the damage award. In support of its motion, the estate submitted affidavits of two of the jurors in this case. The district court denied the estate's motion. The court determined that the damages awarded were supported by the evidence and the presence of exhibit 4 in the jury room was not shown, by clear and convincing evidence, to have prejudiced the estate. The estate appealed.

ASSIGNMENTS OF ERROR

The estate assigns that the district court erred in denying its motion for a new trial based on (1) jury misconduct and (2) inadequacy of the damage award.

STANDARD OF REVIEW

[1,2] A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion.[1] A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through the judicial system.[2]

[3] The amount of damages to be awarded is a determination solely for the fact finder, and the fact finder's decision will not be disturbed on appeal if it is supported by the evidence and bears a reasonable relationship to the elements of the damages proved.[3]

ANALYSIS

Jury Misconduct

The estate argues that the personal financial slide calculator and the inflation rate on the "Post-it" note constitute

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[1] *Roth v. Wiese*, 271 Neb. 750, 716 N.W.2d 419 (2006).

[2] *Hamit v. Hamit*, 271 Neb. 659, 715 N.W.2d 512 (2006).

[3] *Shipler v. General Motors Corp.*, 271 Neb. 194, 710 N.W.2d 807 (2006).

extraneous prejudicial information pursuant to Neb. Rev. Stat. § 27-606(2) (Reissue 1995). The estate contends that given the presence of these items in the jury deliberation room, the district court abused its discretion in denying the estate's motion for new trial.

Section 27-606(2) prohibits a juror from testifying as to information relating to the process of jury deliberations, except that evidence may be adduced "on the question whether extraneous prejudicial information was improperly brought to the jury's attention." The affidavits offered by the estate were relevant to the issue of whether extraneous prejudicial information was improperly brought to the jury's attention. The issue before this court, then, is whether, in light of the evidence presented, the estate has met its burden of proving that prejudice has occurred. We conclude that the estate has not met this burden and therefore affirm the judgment of the district court.

[4-6] An application for new trial may properly be based upon allegations of misconduct of the jury.[4] In a motion for new trial, allegations of misconduct by jurors must be substantiated by competent evidence.[5] The misconduct complained of must relate to a disputed matter that is relevant to the issues in the case and must have influenced the jurors in arriving at the verdict.[6]

[7-10] In order for a new trial to be ordered because of juror misconduct, the party claiming the misconduct has the burden to show by clear and convincing evidence that prejudice has occurred.[7] Clear and convincing evidence is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved.[8] Extraneous material or information considered by a jury may

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[4] See, Neb. Rev. Stat. § 25-1142 (Cum. Supp. 2006); *Leavitt v. Magid*, 257 Neb. 440, 598 N.W.2d 722 (1999).

[5] *Smith v. Papio-Missouri River NRD*, 254 Neb. 405, 576 N.W.2d 797 (1998); *Nichols v. Busse*, 243 Neb. 811, 503 N.W.2d 173 (1993).

[6] *Smith, supra* note 5.

[7] *Hunt v. Methodist Hosp.*, 240 Neb. 838, 485 N.W.2d 737 (1992).

[8] *Dillon Tire, Inc. v. Fifer*, 256 Neb. 147, 589 N.W.2d 137 (1999).

be deemed prejudicial without proof of actual prejudice if the material or information relates to an issue submitted to the jury and there is a reasonable possibility that the extraneous material or information affected the verdict to the detriment of a litigant.[9] The trial court's ruling on a question involving jury misconduct will not be disturbed on appeal absent an abuse of discretion.[10]

In support of its motion for new trial, the estate offered the affidavits of jurors L.O. and S.W. Juror L.O. averred that exhibit 4 belonged to him and was in his sports coat pocket when the jury began deliberations. Juror L.O. further averred that the "Post-it" note with the inflation rate was also his and was attached to the personal financial slide calculator when it came out of his coat in the jury room. Juror L.O. explained that he "looked at Exhibit No. 4 during the deliberations but did not pass it around to other jurors." Juror S.W. stated in her affidavit that "she did not look at Exhibit No. 4 during the jury deliberations" but she did observe "other jurors looking at Exhibit No. 4 during the course of deliberations."

The estate contends that in light of these affidavits, there is a reasonable possibility that exhibit 4 affected the verdict to its detriment. The court denied the estate's motion for a new trial, concluding that the estate had failed to show by clear and convincing evidence that it was prejudiced by the presence of exhibit 4. We agree. While we do not condone the presence of these nonevidentiary items in the jury deliberation room without the knowledge of the court, we nonetheless cannot say, under these circumstances, that the presence of exhibit 4 in the deliberation room rises to the level of prejudice which warrants setting aside the jury's verdict.

The personal financial slide calculator, in this instance, was nothing more than a device which allowed the user to perform mathematic calculations quickly and easily.[11] It was not itself

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[9] *In re Petition of Omaha Pub. Power Dist.*, 268 Neb. 43, 680 N.W.2d 128 (2004).

[10] *Id.*

[11] See *State v. Lihosit*, 131 N.M. 426, 38 P.3d 194 (N.M. App. 2002).

evidence of a fact at issue, nor did it create evidence that the jury could have considered.[12] A juror referencing the slide calculator would have to decide each and every variable that went into the calculation of the verdict, including the amount of money, rate of interest, and period of time.[13] In reality, all the slide calculator did was perform a mathematical calculation that could have been done with a pencil and paper, except that the slide calculator potentially made the calculation easier and the result more accurate.[14]

In evaluating prejudice, we also note that neither party presented any evidence to the jury with regard to the process by which the jury was to calculate the present value of any damages. In this regard, the only guidance the jury received was given by the court in jury instruction No. 8, which instructed the jury to reduce damages for future losses to their present cash value, but did not explain how this was to be done.

Given that the jury was not provided any evidence on present value, nor instructed as to how present value was to be calculated, the personal financial slide calculator and the handwritten inflation rate could not have contradicted any of the evidence presented at trial. Nor could the jury have given undue weight to these items, while disregarding other evidence adduced at trial, because there simply was no evidence presented on this issue.

We also note that the affidavits are not clear as to how many of the jurors actually saw the personal financial slide calculator and inflation rate during deliberations. The estate offered the affidavits of two jurors. Only one of those jurors looked at exhibit 4. Although juror S.W. stated that "other jurors" looked at exhibit 4, it is unclear whether juror S.W.'s reference to "other jurors" indicated anyone other than juror L.O. Juror

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[12] See, *Imperial Meat Company v. United States*, 316 F.2d 435 (10th Cir. 1963); *Lihosit, supra* note 11.

[13] See *Lihosit, supra* note 11.

[14] See, *Imperial Meat Company, supra* note 12; *Lihosit, supra* note 11. See, also, *Zenda Grain & Supply Co. v. Farmland Industries, Inc.*, 20 Kan. App. 2d 728, 894 P.2d 881 (1995); *Bobbie Brooks, Inc. v. Goldstein*, 567 S.W.2d 902 (Tex. Civ. App. 1978).

L.O.'s affidavit plainly states that he "did not pass [exhibit 4] around to other jurors." The evidence is at best inconclusive as to how many other jurors, if any, viewed exhibit 4 during deliberations.

Furthermore, there is no evidence that exhibit 4 influenced the jury's decision in any way, much less that it influenced the decision in any particular way. While it is possible that the presence of exhibit 4 in the jury deliberation room resulted in a decreased award, it is equally possible that its presence resulted in an increase in the award. We have no basis, other than speculation, upon which to determine how a juror's calculation of present value would be affected by exhibit 4, if it was affected at all.

In short, the record does not contain clear and convincing evidence that prejudicial jury misconduct occurred. Given the circumstances of this case, we cannot say that the estate was prevented from receiving a fair trial. Accordingly, we conclude that the estate has not met its burden of proving prejudicial jury misconduct, and the trial court did not abuse its discretion in denying the estate's motion for a new trial on this basis.

Adequacy of Verdict

[11-13] The estate also contends that the damage award was inadequate. This court has consistently recognized that a plaintiff in an action for wrongful death of a child may recover damages for loss of the deceased's society, comfort, and companionship which are shown by the evidence to have a pecuniary value.[15] The term "society" embraces a broad range of mutual benefits each family member receives from the other's continued existence, including love, affection, care, attention, companionship, comfort, and protection.[16] Parental loss is not limited to or necessarily dependent upon deprivation of the child's monetary contribution toward parental well-being.[17] However, damages on account of mental suffering or

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[15] See *Brandon v. County of Richardson*, 264 Neb. 1020, 653 N.W.2d 829 (2002).

[16] *Id.*

[17] *Id.*

bereavement or as solace to the next of kin on account of the death are not recoverable.[18]

[14,15] An award of damages may be set aside as inadequate when, and not unless, it is so inadequate as to be the result of passion, prejudice, mistake, or some other means not apparent in the record.[19] If an award of damages shocks the conscience, it necessarily follows that the award was the result of passion, prejudice, mistake, or some other means not apparent in the record.[20]

With regard to the adequacy of a verdict, we have stated that "'[i]t is virtually impossible to "color match" cases' to determine whether a verdict in a particular case was adequate."[21] One common thread runs throughout all wrongful death cases, namely, that damages in any wrongful death case are incapable of precise computation and are largely a matter for the jury.[22]

In the present case, there is uncontroverted evidence of a close and loving relationship between Heather and her parents. The testimony presented at trial shows that Heather was a bright, considerate, dependable, and loving child who had a variety of interests both in and out of school. However, based on the facts and circumstances of this case, we cannot say that the jury verdict was so inadequate as to be the result of passion, prejudice, mistake, or some other means not apparent in the record. The jury was instructed, without objection, to consider the following factors when arriving at a verdict:

> (1) Any financial support, services, comfort or companionship that Heather Poppe gave to her parents before her death and the prospect that there would have been changes in the future;
>
> (2) the physical and mental health of Heather Poppe had she lived;

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[18] See *Nelson v. Dolan*, 230 Neb. 848, 434 N.W.2d 25 (1989).

[19] *Brandon, supra* note 15.

[20] *Id.*

[21] *Reiser v. Coburn*, 255 Neb. 655, 660, 587 N.W.2d 336, 340 (1998).

[22] See *id.*

(3) Heather Poppe's life expectancy immediately before her death; and

(4) the life expectancy of Heather Poppe's parents.

At the time of her death, Heather was 19 years old and had moved away from her parents in Kearney to attend school in Milford. Although Heather kept in contact with her family and came home to Kearney every weekend, the evidence reveals that Heather's time with her parents was limited and was becoming increasingly so as a result of the many activities in her life. The jury was also entitled to consider, in its determination of damages, the life expectancy of Heather's parents. A significant amount of testimony was presented at trial indicating that Arthur and Barbara each had a history of health problems that could affect their life expectancies.

The amount of damages to be awarded is a determination solely for the fact finder, and the fact finder's decision will not be disturbed on appeal if it is supported by the evidence and bears a reasonable relationship to the elements of the damages proved.[23] Given our standard of review and the record with which we are presented, we conclude that the evidence presented at trial was adequate to support the award of $46,925.60, and therefore, the district court did not abuse its discretion in overruling the estate's motion for new trial.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED.

HEAVICAN, C.J., not participating.

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[23] *Shipler, supra* note 3.

JUDITH A. HUGHES, IN HER OWN RIGHT, AND JUDITH A. HUGHES, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF NICKOLAS J. HUGHES, DECEASED, APPELLANT, V. OMAHA PUBLIC POWER DISTRICT, A NEBRASKA POLITICAL SUBDIVISION, ET AL., APPELLEES.

JUDITH A. HUGHES, IN HER OWN RIGHT, AND JUDITH A. HUGHES, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF NICKOLAS J. HUGHES, DECEASED, APPELLANT, V. NEBRASKA COMMUNICATIONS, INC., A NEBRASKA CORPORATION, AND RADIODETECTION CORPORATION, A NEW JERSEY CORPORATION, APPELLEES.

735 N.W.2d 793

Filed July 27, 2007. Nos. S-05-1223, S-06-216.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court resolves the questions of law independently of the trial court's conclusions.
4. **Negligence.** The threshold issue in any negligence action is whether the defendant owes a legal duty to the plaintiff. If there is no legal duty, there is no actionable negligence.
5. ____. The question in a negligence action of what duty is owed and the scope of that duty is multifaceted. The question of whether a duty exists at all is a question of law.
6. **Public Utilities: Electricity: Negligence.** A power company engaged in the transmission of electricity is required to exercise reasonable care in the construction and maintenance of its lines.
7. ____: ____: ____. The degree of care a power company must exercise varies with the circumstances, but it must be commensurate with the dangers involved, and where wires are designed to carry electricity of high voltage, the law imposes the duty to exercise the utmost care and prudence consistent with the practical operation of the power company's business to avoid injury to persons and property.
8. **Public Utilities: Negligence.** Power companies must anticipate and guard against events which may reasonably be expected to occur, and the failure to do so is negligence.
9. **Public Utilities: Electricity: Negligence.** Where circumstances are such that the probability of danger to persons having the right to be near an electrical line is reasonably foreseeable, power companies may be held liable for injury or death resulting from contact between the powerline and a movable machine. However,

a failure to anticipate and guard against a happening which would not have arisen except under exceptional or unusual circumstances is not negligence.

10. **Negligence.** In determining whether a legal duty exists for actionable negligence, an appellate court employs a risk-utility test, considering (1) the magnitude of the risk, (2) the relationship of the parties, (3) the nature of the attendant risk, (4) the opportunity and ability to exercise care, (5) the foreseeability of the harm, and (6) the policy interest in the proposed solution.
11. **Negligence: Words and Phrases.** In the context of whether a legal duty exists, foreseeability refers to the knowledge of the risk of injury to be apprehended. The risk reasonably to be perceived defines the duty to be obeyed; it is the risk reasonably within the range of apprehension, of injury to another person, that is taken into account in determining the existence of the duty to exercise care.
12. ____: ____. As currently codified, "assumption of risk" as an affirmative defense means that (1) the person knew of and understood the specific danger, (2) the person voluntarily exposed himself or herself to the danger, and (3) the person's injury or death or the harm to property occurred as a result of his or her exposure to the danger.
13. **Negligence.** The doctrine of assumption of risk applies a subjective standard, geared to the individual plaintiff and his or her actual comprehension and appreciation of the nature of the danger he or she confronts.
14. ____. The subjective standard which is applied to assumption of risk involves an inquiry into what the particular plaintiff in fact sees, knows, understands, and appreciates.
15. ____. The doctrine of assumption of risk applies to known dangers and not to those things from which, in possibility, danger may flow.
16. **Negligence: Proof: Circumstantial Evidence.** Knowledge in the context of assumption of risk involves a state of mind or mental process which may be proved by circumstantial evidence.

Appeals from the District Court for Douglas County: PATRICIA A. LAMBERTY, Judge. Judgment in No. S-05-1223 affirmed. Judgment in No. S-06-216 reversed, and cause remanded for further proceedings.

Raymond E. Baker, of Law Offices of Raymond E. Baker, P.C., and Michael W. Heavey, of Colombo & Heavey, P.C., for appellant.

Rex A. Rezac and Russell A. Westerhold, of Fraser, Stryker, Meusey, Olson, Boyer & Bloch, P.C., for appellee Omaha Public Power District.

Daniel P. Chesire, of Lamson, Dugan & Murray, L.L.P., and Raymond E. Walden, of Walden Law Office, for appellee Radiodetection Corporation.

Stephen S. Gealy and Amanda A. Dutton, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellee Nebraska Communications, Inc.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

STEPHAN, J.

Nickolas J. Hughes suffered fatal injuries when he came into contact with an underground electrical line owned by Omaha Public Power District (OPPD) while working in an excavation. Judith A. Hughes, his widow and the personal representative of his estate, brought this personal injury and wrongful death action against OPPD; Nebraska Communications, Inc. (NebCom); and Radiodetection Corporation (RDC). The district court granted OPPD's motion for summary judgment, concluding that it owed no legal duty to Hughes. Subsequently, in a separate order, the court entered summary judgment in favor of NebCom and RDC, determining as a matter of law that by his actions, Hughes had assumed the risk of injury. The personal representative perfected timely appeals from both orders, and we consolidated the appeals. We conclude that the record supports the judgment entered by the district court in favor of OPPD but does not support the judgment in favor of NebCom and RDC.

I. BACKGROUND

1. OMAHA PUBLIC POWER DISTRICT

OPPD is a publicly owned utility company providing electrical power to Omaha, Nebraska, and portions of southeastern Nebraska. It is a political subdivision of the State.[1]

(a) Underground Electrical Powerline

OPPD maintains a buried, 8,000-volt, three-phase powerline in a public utility easement along portions of the east side of 120th Street in Omaha. The installation consists of three individual phase cables and one neutral cable, each housed in unmarked PVC conduit approximately 3 inches in diameter.

[1] See Neb. Rev. Stat. § 13-903(1) (Cum. Supp. 2006).

The conduits are buried 3 to 4 feet below the surface of the ground. The relevant portions of the powerline along 120th Street were installed in 1980 and 1985.

At the time the powerlines were installed, OPPD had an internal reference drawing which provided design specifications on buried cable trenches. That standard provided that when specified by an OPPD design engineer, a warning or identifying tape may be buried 1 foot below the surface of the ground directly above the buried powerlines. The tape was described as a "thin piece of plastic with some type of verbiage" indicating the presence of a buried cable below. Testimony indicated that the decision on whether to specify the identifying tape is discretionary with OPPD design engineers. When asked the circumstances in which such specification would be made, an OPPD representative testified:

> This particular cable was located in public right away [sic]. The people digging in those types of facilities are, generally, contractors and people in the business. If we were to go across private property, like, the homeowners', we never called in to get a locate. The engineer would have probably specified it or might have specified if he thought it was necessary.

A buried-cable industry standard also existed at the time the powerlines were installed. The relevant standards for the buried powerlines in question were the 1977 and 1984 editions of the American National Standards Institute's National Electrical Safety Code. Both standards specified, among other things, the minimum horizontal clearances between cables and minimum burial depth. However, neither standard required that the conduit or sheathing contain warning markings, nor did either require that warning or identifying tape be buried with the cable.

(b) One-Call Notification System Act

In 1994, the Legislature enacted the One-Call Notification System Act, Neb. Rev. Stat. §§ 76-2301 to 76-2330 (Reissue 1996).[2] As the owner of buried electrical utilities, OPPD is an

[2] See 1994 Neb. Laws, L.B. 421.

operator for purposes of the act.[3] At all relevant times to this action, Diggers Hotline of Nebraska operated the statewide call center providing the buried utility notification services required by the act.[4] In 2001, the act provided:

> (1) A person shall not commence any excavation without first giving notice to every operator. An excavator's notice to the center shall be deemed notice to all operators. An excavator's notice to operators shall be ineffective for purposes of this subsection unless given to the center. Notice to the center shall be given at least two full business days, but no more than ten business days, before commencing the excavation . . . . An excavator may commence work before the elapse of two full business days when (a) notice to the center has been given as provided by this subsection and (b) all the affected operators have notified the excavator that the location of all the affected operator's underground facilities have been marked or that the operators have no underground facilities in the location of the proposed excavation.
>
> (2) The notice required pursuant to subsection (1) of this section shall include (a) the name and telephone number of the person making the notification, (b) the name, address, and telephone number of the excavator, (c) the location of the area of the proposed excavation . . . (d) the date and time excavation is scheduled to commence, (e) the depth of excavation, (f) the type and extent of excavation being planned . . . and (g) whether the use of explosives is anticipated.[5]

The act requires that operators receiving notice from the center of a planned excavation "shall advise the excavator of the approximate location of underground facilities in the area of the proposed excavation by marking or identifying the location of the underground facilities with stakes, flags, paint, or

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[3] See § 76-2313.

[4] See §§ 76-2305 and 76-2318.

[5] § 76-2321.

any other clearly identifiable marking or reference point."[6] The act further specifies that marking or identification of underground facilities

> shall be done in a manner that will last for a minimum of five business days on any nonpermanent surface and a minimum of ten business days on any permanent surface. If the excavation will continue for longer than five business days, the operator shall remark or reidentify the location of the underground facility upon the request of the excavator. The request for remarking or reidentification shall be made through the center.[7]

The act imposes strict liability for property damage on excavators who fail to give notice of an excavation and subsequently damage underground facilities.[8] The act further imposes civil penalties on operators and excavators who violate the notification and marking provisions of the act.[9]

2. Radiodetection Corporation

RDC is a New Jersey corporation which manufactures equipment used to locate underground utilities. One of its products is the "GatorCam System," which includes, among other things, a "Gator Locator," and a "Gator Transmitter." The system can be used in different modes of operation, depending on the type of buried utility that is sought to be located.

3. Nebraska Communications

NebCom is a telecommunications contractor located in Sarpy County, Nebraska. It acts as a general contractor for telecommunications companies requiring installation and maintenance projects. In 2001, NebCom served as a general contractor for Qwest Communications, formerly known as U S West Communications.

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[6] § 76-2323(1).

[7] § 76-2323(2).

[8] See § 76-2324.

[9] See § 76-2325.

On June 14, 2001, Qwest Communications engaged NebCom to clean out an empty PVC conduit buried in the utility easement along the east side of 120th Street in Omaha, south of Miracle Hills Drive. NebCom subcontracted the work to Burton Plumbing Services, Inc. (Burton), a plumbing contractor located in Omaha. NebCom did not notify Diggers Hotline at any time relevant to the project.

4. Nickolas Hughes

Hughes was employed by Burton as a lead drain technician. He had been employed by Burton since about 2000 and was supervised by Bruce Arp and, on specific projects, by Patrick Morse. Arp testified that Hughes had been instructed on how to use the GatorCam system. Other testimony established that Burton employees attended periodic safety training and had generally been instructed that they were not to cut into any object unless the employee was absolutely sure of what it was. One employee testified that he was not specifically instructed on this point by Burton but that he knew from experience and common sense not to cut a line without knowing what it was.

5. Hughes' Accident

Sometime between June 14 and June 22, 2001, Hughes and Steven Sinnett, another Burton employee, began the work of cleaning the buried conduit along 120th Street. They used a specialized commercial pressure washer called a jetter which they inserted into the empty conduit from a manhole access point located on the east side of 120th Street south of Miracle Hills Drive. They extended the jetter through the conduit to the next manhole access point to the north, a distance of about 400 to 500 feet. When the jetter had been completely fed through the conduit, they connected a separate cable to the jetter head and attempted to pull the jetter and cable back through the conduit. During this process, the jetter became stuck. Burton employees used various methods to attempt to dislodge the jetter from the conduit, but were unsuccessful. At some point, Burton informed NebCom of the situation. The NebCom maintenance supervisor testified that she offered to hire an excavation contractor to retrieve the jetter for Burton, but Hughes declined that offer, indicating that Burton was capable of such excavation project.

On or about June 27, 2001, Burton employees Danny Anderson and Richard Griffen were sent to excavate in the area of the stuck jetter. They were under the supervision of Morse. Based on the estimated amount of jetter hose which had been fed into the conduit, they began digging a hole about 300 feet south of Miracle Hills Drive. The evidence reflects that no one from Burton called Diggers Hotline before commencing this excavation. However, Anderson, Griffen, and Morse testified that they saw paint markings along the sidewalk indicating the existence of buried utilities. The record indicates that another excavating contractor had previously called Diggers Hotline regarding excavation work on the east side of 120th Street, south of Miracle Hills Drive, which was unrelated to this action. Because they were aware from markings on the ground that other buried utilities, including electrical lines, were in the area, Anderson and Griffen used shovels and a probe rod, instead of a backhoe, to excavate. Griffen testified: "We hand-excavated all the utilities because there were so many utilities right in that area there is no way that you could safely get a piece of equipment in there to excavate it. So we hand-dug everything." In this manner, they exposed four conduits. Anderson testified that his instructions were not to touch anything, but to "just dig it up, expose it, and leave it."

Morse testified that he and Hughes discussed the situation at the 120th Street jobsite at Burton's shop on June 27, 2001. Morse informed Hughes that he intended to place a request through Diggers Hotline to have the utility companies, including OPPD, come to the site to identify the exposed conduits. Morse testified that he mentioned the risk of electrocution and told Hughes not to cut any of the conduits until they were identified. Morse also testified that on the following morning, while working with Hughes at another jobsite, he again told him not to cut any of the exposed conduits at the 120th Street site until they were identified. Morse told Hughes that he had to go to another site, but that he would meet him at the 120th Street site and that Hughes should not do anything until Morse arrived there.

On the morning of June 28, 2001, Sinnett arrived at the 120th Street site and attempted to use an RDC GatorCam system

owned by Burton to verify that the stuck jetter was located in the excavated area. Sinnett pushed a metal "fish tape" into the conduit as far as it would go, thereby reaching the location at which he assumed the jetter was stuck. He then connected one Gator transmitter lead to the fish tape and the other lead to a grounding rod. Using the Gator locator, Sinnett was able to detect a signal emanating from the fish tape. The signal was not detected by the Gator locator beyond the excavated hole. Sinnett concluded that the jetter was located in one of the exposed conduits in the excavation.

Hughes arrived at the excavation scene later that morning. He used the Gator locator in the same manner as had Sinnett. Standing in the excavation, Hughes then used a multipurpose handtool to tap on each of the four exposed conduits. Sinnett heard Hughes say that one of the conduits sounded hollow, and then Sinnett observed as Hughes began cutting it with the handtool. Another eyewitness, Burton employee Paul Barrett, testified that immediately before cutting the conduit, Hughes joked about the possibility that it might be a sprinkler line and that he could be sprayed with water. Sinnett, Barrett, and Anderson, who was also present at the jobsite, testified that shortly after Hughes began cutting into the conduit, a ball of fire erupted from the excavated hole. After the fire subsided, the three pulled Hughes from the excavation. Hughes suffered severe burn injuries from which he died on the following day.

6. Procedural History

(a) Pleadings

On June 25, 2003, the personal representative filed this action in the district court for Douglas County against OPPD, NebCom, and RDC, seeking damages for Hughes' injuries and death. In her complaint, she alleged, restated, that OPPD was negligent in (1) failing to warn of the presence of the buried electrical transmission line, (2) failing to conspicuously mark the buried lines with warnings, and (3) burying the lines directly adjacent to other utility conduits. She further alleged, restated, that NebCom was negligent in (1) failing to provide precautions regarding the safe conduct of the work, (2) failing to provide a safe workplace, (3) placing its utility conduit directly

adjacent to electrical powerlines, (4) failing to exercise its right to control the safety and supervise the work of Hughes, and (5) failing to provide adequate training and/or equipment to Burton employees. The personal representative also alleged negligence and strict liability claims against RDC.

OPPD answered, denying its negligence and raising several affirmative defenses, including assumption of risk. In their answers, NebCom and RDC also pled assumption of the risk as an affirmative defense.

(b) Summary Judgment as to OPPD:
Case No. S-05-1223

All three defendants subsequently moved for summary judgment. After conducting a hearing at which evidence was offered in support of and in opposition to the motions, the district court sustained OPPD's motion for summary judgment but denied those of NebCom and RDC. The district court reasoned that because OPPD did not have notice of the excavation in the area of its buried powerlines as required under the One-Call Notification System Act, it did not owe a duty to warn Hughes of such lines. The court also determined that the personal representative did not present expert testimony on the issue of standard of care. In the same order, the district court denied the motions for summary judgment filed by NebCom and RDC, determining that there were genuine issues of material fact with respect to some claims and defenses, including assumption of risk. Pursuant to Neb. Rev. Stat. § 25-1315(1) (Cum. Supp. 2004), the district court directed that the judgment in favor of OPPD was final. From that order, the personal representative perfected a timely appeal, which we moved to our docket on our own motion.[10] That appeal is docketed as case No. S-05-1223.

(c) Summary Judgment as to NebCom and RDC:
Case No. S-06-216

After conducting additional discovery, NebCom and RDC again moved for summary judgment. Following a hearing at

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[10] See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

which additional evidence was received, the district court sustained both motions, determining as a matter of law that the personal representative's claims were barred by the assumption of risk defenses asserted by NebCom and RDC. The court determined that Hughes knew of and understood the specific risk posed to him by the powerline, that Hughes voluntarily exposed himself to the danger, and that Hughes' death occurred as a result of his exposure to the danger. After the district court directed entry of a final judgment pursuant to § 25-1315(1), the personal representative timely appealed. We granted the petitions of the personal representative and NebCom to bypass the Nebraska Court of Appeals and consolidated this appeal with the appeal involving OPPD.[11] The appeal from the order dismissing the action as to NebCom and RDC is before us as case No. S-06-216.

II. ASSIGNMENTS OF ERROR

In the action against OPPD, the personal representative assigns, restated and consolidated, that the district court erred in finding that (1) OPPD did not owe a duty to warn Hughes and (2) she failed to carry her burden of proof by failing to provide expert testimony.

In the action against NebCom and RDC, the personal representative assigns, restated and consolidated, that the district court erred in finding that Hughes knew and appreciated the danger that existed.

III. STANDARD OF REVIEW

[1,2] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[12] In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted

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[11] See § 24-1106(2).

[12] *City of Lincoln v. Hershberger*, 272 Neb. 839, 725 N.W.2d 787 (2007).

and gives such party the benefit of all reasonable inferences deducible from the evidence.[13]

[3] When reviewing questions of law, an appellate court resolves the questions of law independently of the trial court's conclusions.[14]

IV. ANALYSIS

1. Case No. S-05-1223: Summary Judgment in Favor of OPPD

[4,5] The personal representative alleged that OPPD was negligent in failing to warn of the existence and location of its underground powerline. The threshold issue in any negligence action is whether the defendant owes a legal duty to the plaintiff.[15] If there is no legal duty, there is no actionable negligence.[16] The question of what duty is owed and the scope of that duty is multifaceted.[17] First, and foremost, the question of whether a duty exists at all is a question of law.[18]

(a) Statutory Duty

At the time of the accident, OPPD had certain duties under the One-Call Notification System Act. The act was intended "to establish a means by which excavators may notify operators of underground facilities in an excavation area so that operators have the opportunity to identify and locate the underground facilities prior to excavation."[19] The purpose of the act was "to aid the public by preventing injury to persons and damage to property and the interruption of utility services resulting from

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[13] *Id.*

[14] *City of Elkhorn v. City of Omaha*, 272 Neb. 867, 725 N.W.2d 792 (2007).

[15] *Washington v. Qwest Communications Corp.*, 270 Neb. 520, 704 N.W.2d 542 (2005); *Fuhrman v. State*, 265 Neb. 176, 655 N.W.2d 866 (2003).

[16] *Id.*

[17] *Cerny v. Cedar Bluffs Jr./Sr. Pub. Sch.*, 262 Neb. 66, 628 N.W.2d 697 (2001).

[18] *Id.*

[19] § 76-2302(1).

accidents caused by damage to underground facilities."[20] The term "underground facility" as used in the act includes buried electric lines.[21] As noted above, the duty is triggered by notice, transmitted through Diggers Hotline, that a person intends to excavate in a particular area.[22] The act requires that operators receiving notice from the center of a planned excavation "shall advise the excavator of the approximate location of underground facilities in the area of the proposed excavation by marking or identifying the location of the underground facilities with stakes, flags, paint, or any other clearly identifiable marking or reference point."[23] The act further specifies that marking or identification of underground facilities

> shall be done in a manner that will last for a minimum of five business days on any nonpermanent surface and a minimum of ten business days on any permanent surface. If the excavation will continue for longer than five business days, the operator shall remark or reidentify the location of the underground facility upon the request of the excavator. The request for remarking or reidentification shall be made through the center.[24]

There is no evidence that OPPD violated its statutory duty imposed by the One-Call Notification System Act. It is uncontroverted that no one from Burton notified Diggers Hotline before commencing the excavation. The record reflects that in response to notices transmitted to Diggers Hotline by other contractors in the weeks preceding the accident, OPPD marked its underground lines in the vicinity of 120th Street and Miracle Hills Drive. There is no evidence or claim that it did so in a manner contrary to the requirements of the act. There is no evidence that OPPD had actual or constructive knowledge that Burton employees had excavated and were working in the area in which the accident occurred.

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[20] § 76-2302(2).

[21] § 76-2317.

[22] See § 76-2321.

[23] § 76-2323(1).

[24] § 76-2323(2).

(b) Common-Law Duty

[6,7] Our jurisprudence defining the duty of electric utilities to protect against electrocution is derived primarily from cases involving inadvertent contact with powerlines situated at or above ground level. In such cases, we have recognized that a power company engaged in the transmission of electricity is required to exercise reasonable care in the construction and maintenance of its lines.[25] The degree of care a power company must exercise varies with the circumstances, but it must be commensurate with the dangers involved, and where wires are designed to carry electricity of high voltage, the law imposes the duty to exercise the utmost care and prudence consistent with the practical operation of the power company's business to avoid injury to persons and property.[26] However, power companies are not insurers and are not liable for damages in the absence of negligence.[27]

[8,9] Power companies must anticipate and guard against events which may reasonably be expected to occur, and the failure to do so is negligence.[28] Where circumstances are such that the probability of danger to persons having the right to be

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[25] *Marshall v. Dawson Cty. Pub. Power Dist.*, 254 Neb. 578, 578 N.W.2d 428 (1998); *Engleman v. Nebraska Public Power Dist.*, 228 Neb. 788, 424 N.W.2d 596 (1988); *Tiede v. Loup Power Dist.*, 226 Neb. 295, 411 N.W.2d 312 (1987); *Roos v. Consumers Public Power Dist.*, 171 Neb. 563, 106 N.W.2d 871 (1961).

[26] *Engleman v. Nebraska Public Power Dist, supra* note 25; *Tiede v. Loup Power Dist., supra* note 25; *Roos v. Consumers Public Power Dist., supra* note 25.

[27] *Marshall v. Dawson Cty. Pub. Power Dist., supra* note 25; *Engleman v. Nebraska Public Power Dist., supra* note 25; *Tiede v. Loup Power Dist., supra* note 25; *Suarez v. Omaha P.P. Dist.*, 218 Neb. 4, 352 N.W.2d 157 (1984); *Lorence v. Omaha P. P. Dist.*, 191 Neb. 68, 214 N.W.2d 238 (1974); *Gillotte v. Omaha Public Power Dist.*, 185 Neb. 296, 176 N.W.2d 24 (1970); *Roos v. Consumers Public Power Dist., supra* note 25.

[28] *Engleman v. Nebraska Public Power Dist., supra* note 25; *Tiede v. Loup Power Dist., supra* note 25; *Suarez v. Omaha P.P. Dist., supra* note 27; *Lorence v. Omaha P. P. Dist., supra* note 27; *Gillotte v. Omaha Public Power Dist., supra* note 27; *Roos v. Consumers Public Power Dist., supra* note 25.

near an electrical line is reasonably foreseeable, power companies may be held liable for injury or death resulting from contact between the powerline and a movable machine.[29] A failure to anticipate and guard against a happening which would not have arisen except under exceptional or unusual circumstances is not negligence.[30]

In *Schmidt v. Omaha Pub. Power Dist.*,[31] we considered the claim of an excavator who was electrocuted when he struck an underground powerline with an auger while digging postholes on commercial property. Before digging, the excavator's employer called Nebraska Underground Hotline to have any buried utilities marked. The hotline passed the information on to utility companies, including OPPD. OPPD then marked the buried powerlines it owned on the property but did not mark any secondary powerlines it did not own. Neither OPPD nor the hotline warned the excavator or his employer of this fact. The excavator subsequently came into contact with an unmarked secondary powerline. This court reversed a summary judgment entered in favor of OPPD on procedural grounds without discussing whether OPPD had a duty to warn beyond marking the underground powerlines that it owned. In discussing whether the hotline owed a duty, we noted: "It is common knowledge that electricity is a dangerous commodity, and it requires little imagination to perceive the risk of electric shock to an individual who digs in an area containing hidden underground electric lines."[32]

[10] Based upon OPPD's reference drawing, the personal representative contends that OPPD had a duty to bury an identifying tape above the powerline to warn of its presence. In determining whether OPPD owed this duty to Hughes and others

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[29] *Engleman v. Nebraska Public Power Dist., supra* note 25; *Tiede v. Loup Power Dist., supra* note 25; *Gillotte v. Omaha Public Power Dist., supra* note 27.

[30] *Roos v. Consumers Public Power Dist., supra* note 25.

[31] *Schmidt v. Omaha Pub. Power Dist.*, 245 Neb. 776, 515 N.W.2d 756 (1994).

[32] *Id.* at 786, 515 N.W.2d at 763.

similarly situated, we employ a risk-utility test, considering (1) the magnitude of the risk, (2) the relationship of the parties, (3) the nature of the attendant risk, (4) the opportunity and ability to exercise care, (5) the foreseeability of the harm, and (6) the policy interest in the proposed solution.[33]

(i) Magnitude and Nature of Risk

Obviously, electricity is a dangerous commodity.[34] As noted, however, most of our cases involving the duty owed by electric utility companies involve powerlines placed above ground level. Underground powerlines present a somewhat different risk, which we identified in *Schmidt* as "the risk of electric shock to an individual who digs in an area containing hidden underground electric lines."[35] In this case, Hughes was not involved in the excavation which exposed the underground line. Burton employees who performed the excavation were aware of the existence of the buried powerlines from surface markings requested by other contractors. Using a probe and shovels, they carefully exposed the conduits. Once exposed, the powerline sheathed in its PVC conduit posed no risk unless intentionally or accidentally cut.

(ii) Relationship of Parties

The record reflects no employment or contractual relationship between OPPD and Hughes or Burton. At the time of the accident, OPPD had not been given actual or constructive notice that Burton employees had exposed the underground powerline and were working in its vicinity.

(iii) Opportunity and Ability to Exercise Care

The personal representative contends that OPPD had the opportunity to exercise care by simply implementing the internal design standards OPPD had in place at the time it originally

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[33] See, *Fuhrman v. State, supra* note 15; *Sharkey v. Board of Regents*, 260 Neb. 166, 615 N.W.2d 889 (2000).

[34] See, *Schmidt v. Omaha Pub. Power Dist., supra* note 31; *Lorence v. Omaha P. P. Dist., supra* note 27; *Gillotte v. Omaha Public Power Dist., supra* note 27.

[35] *Schmidt v. Omaha Pub. Power Dist., supra* note 31, 245 Neb. at 786, 515 N.W.2d at 763.

installed the buried powerlines. Those internal standards indicate that OPPD will bury a warning or identifying tape about 1 foot below the surface of the ground directly above the power cables "when specified" by an OPPD design engineer. OPPD asserts that the decision whether to specify the identifying tape is discretionary with its engineers. Furthermore, OPPD argues that the One-Call Notification System Act eliminated the need for OPPD to use the identifying tape.

Clearly, OPPD design engineers could have specified the identifying tape, although there were no code or industry standards mandating its use. It is not clear, however, that identifying tape would have prevented the accident. At most, the presence of the tape would have warned excavators that they were about to encounter an underground powerline. The Burton employees who did the actual excavation knew this and for that reason, carefully exposed the conduits using handtools instead of power equipment. Because Hughes was not present during the excavation, we cannot say on this record that he would ever have been aware of the identifying tape even if it had been specified and used.

(iv) Foreseeability of Harm

[11] In the context of whether a legal duty exists, foreseeability refers to

> "'"the knowledge of the risk of injury to be apprehended. The risk reasonably to be perceived defines the duty to be obeyed; it is the risk reasonably within the range of apprehension, of injury to another person, that is taken into account in determining the existence of the duty to exercise care."'"[36]

As we noted in *Schmidt*, the risk of accidental harm to a person who excavates in the vicinity of underground electric lines without knowledge of their existence is certainly foreseeable. But that is not the risk at issue in this case. Here, the question is whether the "risk reasonably to be perceived" included

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[36] *Knoll v. Board of Regents*, 258 Neb. 1, 7, 601 N.W.2d 757, 763 (1999) (quoting *Clohesy v. Food Circus Supermkts.*, 149 N.J. 496, 694 A.2d 1017 (1997)).

a contractor's employee intentionally cutting an excavated and exposed underground conduit located in a public right-of-way before it had been identified by a utility company, in violation of his employer's policies. The circumstances of Hughes' fatal injuries are certainly unusual, if not unique. We conclude that these circumstances were not reasonably foreseeable at the time OPPD installed the underground powerline.

(v) Policy Interests

The personal representative argues that because of the dangerous character of electricity, the public has an interest in the prevention of accidents arising from contact with buried powerlines. This argument finds support in *Schmidt*, where we recognized that "[t]he public certainly has a vital interest in preventing accidents from electrical shock."[37] We note, however, that *Schmidt* involved events which occurred before the enactment of the One-Call Notification System Act in 1994, which furthers the policy of the State "to aid the public by preventing injury to persons . . . resulting from accidents caused by damage to underground facilities."[38] In articulating this policy, the Legislature placed the burden on excavators to give notice so that utilities could mark underground facilities before any excavation occurred.

(vi) Conclusion

Upon consideration of the risk-utility factors in light of the facts of this case, we conclude that OPPD did not owe a common-law duty to Hughes. The powerline was situated in a public right-of-way where contractors would reasonably expect to find underground utilities. No statute or code required use of identifying tape at the time the powerline was installed. Most importantly, the circumstances of Hughes' accident do not fall within the "risk reasonably to be perceived" from underground powerlines, as articulated in *Schmidt*. The accident arose from exceptional and unusual circumstances. Because we conclude that OPPD did not owe a common-law duty to Hughes, we

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[37] *Schmidt v. Omaha Pub. Power Dist., supra* note 31, 245 Neb. at 790, 515 N.W.2d at 765.

[38] § 76-2302(2).

need not address the issue of whether the One-Call Notification System Act abrogated any preexisting common-law duty. Nor is it necessary for us to address the district court's ruling with respect to the absence of expert testimony as to the standard of care. We affirm the district court's grant of summary judgment in favor of OPPD.

2. Case No. S-06-216: Summary Judgment in Favor of NebCom and RDC

[12] The issue in this appeal is whether the district court erred in granting the motions for summary judgment of NebCom and RDC based upon the affirmative defense of assumption of risk. As currently codified, "assumption of risk" as an affirmative defense means that (1) the person knew of and understood the specific danger, (2) the person voluntarily exposed himself or herself to the danger, and (3) the person's injury or death or the harm to property occurred as a result of his or her exposure to the danger.[39] It is undisputed that Hughes acted intentionally and voluntarily in cutting into one of the exposed underground conduits and that his death was the result of that act. The issue we must decide is whether, as a matter of law, he acted with knowledge and understanding of the specific danger.

(a) Identification of Specific Danger

The district court defined the specific danger as "cutting into a power line causing an explosion or electrocution." While this describes the mechanism by which the fatal injury occurred, we do not accept it as a description of the "specific danger" which confronted Hughes when he stepped into the excavation and observed the exposed conduits. Nor do we accept the personal representative's argument that Hughes could not have assumed the risk of injury unless he knew that the specific conduit which he intentionally cut contained electricity. The record supports a reasonable inference that Hughes believed he had identified the conduit which contained the jetter he was attempting to dislodge. The specific danger was that at least one of the exposed conduits in the excavation actually contained electrical

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[39] Neb. Rev. Stat. § 25-21,185.12 (Reissue 1995); *Burke v. McKay*, 268 Neb. 14, 679 N.W.2d 418 (2004).

current sufficient to cause injury or death. The question, thus, is whether Hughes knew and appreciated this fact when he cut into the conduit in which he believed the jetter was lodged.

(b) Knowledge and Understanding of Specific Danger

[13-15] The doctrine of assumption of risk applies a subjective standard, geared to the individual plaintiff and his or her actual comprehension and appreciation of the nature of the danger he or she confronts.[40] This subjective standard involves an inquiry into what the particular plaintiff in fact sees, knows, understands, and appreciates.[41] The doctrine of assumption of risk applies to known dangers and not to those things from which, in possibility, danger may flow.[42] As a respected commentator has explained:

> "Knowledge of the risk is the watchword of assumption of risk." Under ordinary circumstances the plaintiff will not be taken to assume any risk of either activities or conditions of which he has no knowledge. Moreover, he must not only know of the facts which create the danger, but he must comprehend and appreciate the nature of the danger he confronts. . . . If, because of age or lack of information or experience, he does not comprehend the risk involved in a known situation, he will not be taken to consent to assume it. His failure to exercise ordinary care to discover the danger is not properly a matter of assumption of risk, but of the defense of contributory negligence.[43]

In applying this subjective standard, our cases recognize that a plaintiff's knowledge of a general danger inherent in

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[40] *Burke v. McKay, supra* note 39; *Jay v. Moog Automotive*, 264 Neb. 875, 652 N.W.2d 872 (2002).

[41] See, *Dukat v. Leiserv, Inc.*, 255 Neb. 750, 587 N.W.2d 96 (1998); *Williamson v. Provident Group, Inc.*, 250 Neb. 553, 550 N.W.2d 338 (1996); Restatement (Second) of Torts § 496D comment *c.* (1965).

[42] *Pleiss v. Barnes*, 260 Neb. 770, 619 N.W.2d 825 (2000); *Vanek v. Prohaska*, 233 Neb. 848, 448 N.W.2d 573 (1989); *Hickman v. Parks Construction Co.*, 162 Neb. 461, 76 N.W.2d 403 (1956).

[43] W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 68 at 487 (5th ed. 1984).

a particular activity is not enough to establish assumption of risk. Rather, the plaintiff must have actual knowledge of the specific danger which caused the injury. For example, in *Pleiss v. Barnes*, we held that the jury should not have been instructed on assumption of risk in a case involving a person who fell from a ladder when it "'flipped, twisted and started to slide'" as he placed shingles on a roof.[44] We reasoned that the plaintiff's admission that he knew that ladders could "'get shaky and fall'" was simply an acknowledgment that he was aware of the general danger involved in using ladders, but did not constitute knowledge of the specific risk that the ladder from which he fell could perform as it did.[45] In *Burke v. McKay*,[46] an action involving a claim that a rodeo stock provider furnished an unusually dangerous bucking horse to a high school rodeo, we noted that the plaintiff rider's acknowledged familiarity with the general risks of injury inherent in rodeo competition could not form the basis of an assumption of risk defense. However, we concluded that the rider had actual knowledge of the specific danger posed by the horse because he had observed a previous incident in which a rider was injured when the same horse performed in the same unusual manner which caused his injury.

[16] The issue in this case is not whether Hughes should have known that one or more of the exposed conduits contained electrical current, but whether he actually knew, understood, and appreciated this specific danger. There is no direct evidence in the form of an admission or other statement by Hughes prior to his death that he had such knowledge. However, knowledge in the context of assumption of risk involves a state of mind or mental process which may be proved by circumstantial evidence.[47] In concluding that Hughes knew and

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[44] *Pleiss v. Barnes, supra* note 42, 260 Neb. at 771, 619 N.W.2d at 827.

[45] *Id.* at 775, 619 N.W.2d at 829.

[46] *Burke v. McKay, supra* note 39.

[47] See, *Sikyta v. Arrow Stage Lines*, 238 Neb. 289, 470 N.W.2d 724 (1991); *Mandery v. Chronicle Broadcasting Co.*, 228 Neb. 391, 423 N.W.2d 115 (1988).

understood the danger, the district court relied primarily on evidence of red markings in the area of the excavation which indicated the presence of underground powerlines, as well as statements made to Hughes by Burton employees about the danger of cutting into unidentified lines.

As we have noted, neither Burton nor NebCom contacted Diggers Hotline to request identification of underground utilities prior to the accident. However, several witnesses testified that there were visible red markings on the ground in the immediate vicinity of the excavation, apparently remaining from previous construction work in the area, which indicated the presence of underground electrical utilities. Arp, Burton's field supervisor, testified that the company held safety meetings at which the significance of "color codes" used to mark underground utilities was discussed with employees. There is evidence that Burton instructed its employees, including Hughes, never to cut into an underground line which had not been identified. Morse, Burton's utility superintendent, testified that on the afternoon prior to the accident, he told Hughes that he intended to call Diggers Hotline to request identification of the exposed conduits and that Hughes was not to cut anything until this was done. Morse repeated these instructions to Hughes on the following morning before Hughes went to the worksite. Although he could not recall exactly what he said, Morse testified: "I'm sure we discussed not cutting into anything until we find out what the lines are. We don't want to get killed, more or less, probably said that." When then asked "[w]hat was said about what could have happened," Morse testified: "It would probably cost us a $100,000 a day until they get it fixed, or could be electrocuted or anything like that. I mean, you just don't break them, you don't cut into them, you don't do that."

This evidence supports an inference that Hughes was aware of the specific danger posed by one or more electrical lines in the excavation. But when considered with other evidence, a contrary inference that Hughes was only aware of the general dangers is also possible. Arp responded affirmatively when asked if Hughes "knew or had the ability to find out what the different color lines signified after the utilities had been marked." Under the subjective standard applicable to assumption of risk, it must

be shown that Hughes had actual knowledge of the specific danger posed by the existence of an electrical powerline in the excavation where he was working.[48] If he did not, whether he could have discovered the danger is not relevant to the defense.

The record reflects that at least one of Hughes' coworkers was unaware of the powerline and that there was no discussion of it at the jobsite prior to the accident. Sinnett, one of Hughes' coworkers who witnessed the accident, testified that he had been employed by Burton for 2 weeks prior to the accident and had received no training on the subject of underground utility markings. Sinnett also testified that he did not realize the significance of the color markings at the time of the accident and did not receive training on this subject until after the accident occurred. He testified that he did not discuss the markings with Hughes on the day of the accident and did not know if Hughes understood their significance. Sinnett further testified that he did not know what any of the conduits contained and that it did not occur to him that cutting into one of them could be hazardous. Barrett, another Burton employee who witnessed the accident, testified that there had been no discussion involving Hughes regarding the presence of an electrical line in the excavation and that Hughes had joked that the line he was about to cut could be a waterline. The conduits all looked the same and were not marked to identify their contents.

The issue before us in this appeal is not whether Hughes was negligent in cutting into one of the conduits before it was identified, but whether he actually knew that his action could have a fatal consequence because of the presence of an electrical line among the conduits in the excavation. From this record, a finder of fact could reasonably infer that Hughes did not have such knowledge. The evidence that Burton instructed its employees not to cut into unidentified underground lines, including Morse's warning that one "could be electrocuted" if he did so, could be viewed as a reference to the general risk of working around unmarked utility lines, as opposed to a specific warning that the excavation at 120th Street and Miracle Hills Drive actually contained an electrical powerline.

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[48] See *Pleiss v. Barnes, supra* note 42.

We are not persuaded by RDC's argument that two of our prior decisions involving injuries caused by overhead electrical powerlines support its position that Hughes assumed the risk of electrocution as a matter of law. In *Rodgers v. Chimney Rock P.P. Dist.*,[49] we affirmed a finding by the trial court that the plaintiff's decedent had assumed the risk of electrocution when he used a long metal pipe to clean a well situated beneath the powerline. Applying a standard of review requiring deference to the factual findings of the trial court, we noted evidence that the powerline had been in place for approximately 15 years prior to the accident and that the plaintiff's decedent knew of its existence and the danger which it posed at the time of the accident. We held that the evidence was sufficient to support the trial court's finding of contributory negligence and assumption of risk. *Rodgers* differs from the instant case both in the procedural posture in which it reached this court and in the uncontroverted nature of the evidence regarding the accident victim's knowledge of the specific danger posed by the electrical lines in the area where he was working. Although our opinion in *Disney v. Butler County Rural P. P. Dist.*[50] mentions the governing principles of assumption of risk, it affirmed the trial court's dismissal of a personal injury claim "primarily on the ground that the plaintiff was guilty of contributory negligence as a matter of law." We noted that the plaintiff was at all times aware of the 7,200-volt powerline traversing his yard and driveway and that he failed to exercise due care in operating power equipment in its vicinity. No issues of contributory negligence are before us in this appeal.

The governing standard of review for an order of summary judgment should be, and continues to be, one favorable to the nonmoving party.[51] Applying this standard, which requires that we view the evidence in a light most favorable to the party against whom the summary judgment is granted and give such

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[49] *Rodgers v. Chimney Rock P.P. Dist.*, 216 Neb. 666, 345 N.W.2d 12 (1984).

[50] *Disney v. Butler County Rural P. P. Dist.*, 183 Neb. 420, 421, 160 N.W.2d 757, 758 (1968).

[51] *Controlled Environ. Constr. v. Key Indus. Refrig.*, 266 Neb. 927, 670 N.W.2d 771 (2003).

party the benefit of all reasonable inferences deducible from the evidence, we conclude that there are genuine issues of material fact on the issue of whether Hughes knew and appreciated the specific danger posed by the underground electrical line when he took the action which resulted in his death. For this reason, the district court erred in concluding as a matter of law that by such action, Hughes assumed the risk of fatal injury.

V. CONCLUSION

Because we conclude as a matter of law that OPPD did not owe a duty to Hughes under the circumstances of this case, we affirm the judgment of the district court in case No. S-05-1223. However, because we conclude that there are genuine issues of material fact as to the question of whether Hughes assumed the risk of injury, we reverse the judgment entered in favor of NebCom and RDC in case No. S-06-216 and remand the cause to the district court for Douglas County for further proceedings.

JUDGMENT IN NO. S-05-1223 AFFIRMED.
JUDGMENT IN NO. S-06-216 REVERSED, AND CAUSE REMANDED FOR FURTHER PROCEEDINGS.

CONNOLLY, J., dissenting.

The assumption of risk doctrine applies a subjective standard, geared to the individual plaintiff and his or her actual comprehension and appreciation of the danger he or she confronts.[1] The assumption of risk defense requires that (1) Nickolas J. Hughes knew of and understood the specific danger; (2) Hughes voluntarily exposed himself to the danger; and (3) Hughes' injury or death occurred from his exposure to the danger.[2]

The majority decision defines the "specific danger" as the danger that at least one of the conduits in the excavation contained electricity sufficient to cause injury or death. I would define the specific danger confronting Hughes differently than

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[1] *Burke v. McKay*, 268 Neb. 14, 679 N.W.2d 418 (2004). See *Pleiss v. Barnes*, 260 Neb. 770, 619 N.W.2d 825 (2000).

[2] Neb. Rev. Stat. § 25-21,185.12 (Reissue 1995). See, also, *Burke v. McKay, supra* note 1.

the majority. I believe the specific danger was that Hughes could be electrocuted or killed if he cut one of the four unidentified conduits in the 120th Street excavation. I disagree that Hughes must have known there would *actually* be electricity in a conduit to have assumed the risk of electrocution or death. I believe Hughes could assume the risk of being electrocuted simply by knowing that any conduit at that particular site, if cut, could be deadly. Further, the evidence shows that Hughes knew of the specific danger involved in cutting the exposed conduit at the 120th Street jobsite and assumed the risk of his actions.

In concluding that genuine issues of material fact exist regarding whether Hughes knew of the risk posed by the electrical line, the majority opinion discusses the deposition testimony of Hughes' colleagues. As the majority opinion acknowledges, Patrick Morse's testimony supports an inference that Hughes was aware of the specific danger. Morse testified that the day before the accident, he warned Hughes not to cut into any line until it had been identified. The morning of the accident, he again warned Hughes not to cut into anything. The record shows the following exchange:

> [Counsel for NebCom:] Did you tell him not to cut into anything or do anything else until after the utilities specifically identified which line was which?
>
> [Morse:] Correct.
>
> Q. He responded by saying I won't do that or what did he say?
>
> A. Yes, I would use them words, yes, he did, he said okay, I won't.
>
> Q. All right.
>
> A. I was pretty adamant about it.
>
> Q. So you believe you made it crystal clear to him that he absolutely should not do that?
>
> A. Yes.
>
> Q. Do you have any question in your mind that he understood what you were telling him?
>
> A. There is no question in my mind. He understood what I told him.

More important, Morse testified that during his conversations with Hughes, they discussed that they would not cut into the lines before they were identified because they would not "want to get killed" and that one "could be electrocuted."

I believe the warnings Hughes received established that he knew of the specific dangers of electrocution or death associated with cutting an unidentified conduit at the 120th Street jobsite. Although the majority opinion suggests that Morse's warning about electrocution could be viewed as a reference to the general risk of working around unmarked utilities, I disagree. The conversations that took place show that Morse's warnings undoubtedly focused on the specific danger at the 120th Street jobsite.

Further, other evidence the majority opinion cites regarding Hughes' knowledge is irrelevant. The majority opinion reasons that because one of the other employees present when the accident occurred did not know that cutting a conduit could be dangerous, a jury might infer that Hughes also did not know of the danger. Another person's knowledge or lack thereof, however, has no bearing on what Hughes knew. Whether the employees discussed the risk among themselves before the accident also does not show what Hughes knew. Hughes' remark that the line he was about to cut could be a water line demonstrates that despite Morse's warnings, Hughes had decided to cut into a line that he had not positively identified. This does not support an inference that he either did or did not understand the risk associated with his decision.

I believe that the evidence concerning Hughes knowledge of the risk he encountered shows that he knew and understood that cutting a conduit before identifying it could have fatal consequences. And the evidence the majority opinion cites to oppose this view is not germane to whether Hughes subjectively appreciated the danger. I would affirm the district court's decision that Hughes assumed the risk of his actions.

HEAVICAN, C.J., joins in this dissent.

STATE OF NEBRASKA, APPELLEE AND CROSS-APPELLANT, V. JACK E. HARRIS, APPELLANT AND CROSS-APPELLEE.

735 N.W.2d 774

Filed July 27, 2007. No. S-06-062.

1. **Postconviction: Appeal and Error.** On appeal from a proceeding for postconviction relief, the lower court's findings of fact will be upheld unless such findings are clearly erroneous.
2. **Postconviction.** Postconviction relief is a very narrow category of relief.
3. **Postconviction: Constitutional Law: Proof.** In a motion for postconviction relief, the defendant must allege facts which, if proved, constitute a denial or violation of his or her rights under the U.S. or Nebraska Constitution, causing the judgment against the defendant to be void or voidable.
4. **Postconviction: Proof: Appeal and Error.** The appellant in a postconviction proceeding has the burden of alleging and proving that the claimed error is prejudicial.
5. **Postconviction: Judgments: Proof: Appeal and Error.** A court making the prejudice inquiry in a postconviction proceeding must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors.
6. **Criminal Law: Effectiveness of Counsel: Conflict of Interest: Presumptions: Proof.** Under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), there is a limited presumption of prejudice if a criminal defendant can show (1) that his counsel actively represented conflicting interests and (2) that an actual conflict of interest adversely affected his lawyer's performance.
7. **Criminal Law: Effectiveness of Counsel: Conflict of Interest.** The possibility of conflict is insufficient to impugn a criminal conviction.
8. **Postconviction: Effectiveness of Counsel: Conflict of Interest: Proof.** In order to obtain relief in a postconviction action based upon the alleged conflict of interest of trial counsel, the defendant must show an actual, as opposed to an imputed, conflict of interest.
9. **Judges: Recusal.** While a defendant may be entitled to an impartial judge, a defendant does not have the right to have his or her case heard before any particular judge.
10. ____: ____. A motion to disqualify a trial judge on account of prejudice is addressed to the sound discretion of the trial court.
11. **Judges.** A judge must be careful not to appear to act in the dual capacity of judge and advocate.

Appeal from the District Court for Douglas County: PATRICIA A. LAMBERTY, Judge. Affirmed.

James R. Mowbray and Jerry L. Soucie, of Nebraska Commission on Public Advocacy, for appellant.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ., and HANNON, Judge, Retired.

MCCORMACK, J.

NATURE OF CASE

After a trial by jury, Jack E. Harris was convicted of first degree murder and use of a deadly weapon to commit a felony in connection with the killing of Anthony Jones. We affirmed Harris' conviction in *State v. Harris*[1] (*Harris I*). After *Harris I*, Harris filed for postconviction relief. In *State v. Harris*[2] (*Harris II*), we reversed the collateral order of the postconviction court which summarily denied postconviction relief on certain claims, and we remanded the cause for an evidentiary hearing. After an evidentiary hearing, the postconviction court denied Harris' motion for postconviction relief. Harris now appeals from that judgment.

BACKGROUND

The facts surrounding Harris' trial and conviction are fully set forth in *Harris I* and *Harris II*, and are repeated here only as relevant. The principal evidence against Harris at trial was the confession of his accomplice, Howard "Homicide" Hicks, and the testimony of three inmates at the jail where Harris was incarcerated that Harris admitted to killing Jones with the assistance of someone named "Homicide."

An Omaha police detective, Leland Cass, also testified at the trial. Cass described an interview with one of the inmate witnesses during which the inmate first revealed that Harris had admitted to Jones' murder. The State pointed out that the report of the inmate interview did not identify Hicks by his given name, but referred to "Homicide," and foundation was laid to establish that "Homicide" and Hicks were the same person. The State then asked: "And at any point in time, Detective, were you able to establish whether or not this defendant Jack Harris

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[1] *State v. Harris*, 263 Neb. 331, 640 N.W.2d 24 (2002).

[2] *State v. Harris*, 267 Neb. 771, 677 N.W.2d 147 (2004).

knew Howard Hicks as Homicide?" Cass answered, without objection, that he did. Cass did not otherwise elaborate on this statement, but instead went on to testify as to his interview with another of the inmate witnesses.

Upon inquiry during cross-examination, Harris' attorney discovered from Cass that the statement that Harris knew Hicks as "Homicide" was contained in a police report authored by Cass (the Cass report). It is now undisputed that although the State agreed to provide Harris with a copy of all police reports, the State failed to provide Harris with a copy of the Cass report prior to trial.

The report detailed Harris' statements during an interview with Omaha police officers and the Federal Bureau of Investigation in an unrelated drug trafficking investigation. Harris' statements during the interview were made pursuant to a proffer agreement with the U.S. Attorney's office which stated that Harris' statements during the interview would not be used against him.

The Cass report details that Harris was able to name a number of people involved in drug trafficking, including Hicks. Harris identified Hicks by the nickname "Homicide." Harris did not discuss, in that interview, the Jones murder or any information directly relating to that murder.

Based on the prior nondisclosure and alleged inadmissibility of the report, Harris' counsel argued that he was entitled to a *Jackson v. Denno*[3] hearing on the voluntariness of Harris' statement that he knew Hicks as "Homicide." Counsel also argued that the failure to disclose constituted a violation of *Brady v. Maryland*[4] and that the statement was inadmissible because of the proffer agreement, although he later said he had "misspoke" with regard to the allegation of a *Brady* violation. Counsel moved for a mistrial. Counsel stated that had he been informed of the statement earlier, he would have filed a motion to suppress. Counsel did not move for a continuance.

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[3] See *Jackson v. Denno*, 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964).

[4] See *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

The court denied Harris' motions. The court did, however, express its concern that the statement had been obtained after the proffer agreement. Therefore, despite the court's conclusion that the statement was "innocuous," the court offered Harris the option of either having Cass' testimony stricken from the record or cross-examining Cass on the issue.

Harris chose to cross-examine Cass. On cross-examination, Harris elicited testimony from Cass that Harris had never indicated to Cass that Harris knew Hicks personally. Rather, Harris indicated only that he had heard of Hicks by his nickname. Cass testified that he did not know how Harris had learned Hicks' nickname, and Cass did not have any personal knowledge that Harris was actually acquainted with Hicks.

In the direct appeal of his convictions and sentences, Harris raised the failure of the trial court to conduct a *Jackson v. Denno* hearing on the voluntariness of his statement that he knew Hicks as "Homicide," but we held that the court had not abused its discretion, in the absence of dispositive proof as to whether the prosecution actually failed to provide Harris with the Cass report.[5]

Thereafter, Harris filed a postconviction motion alleging, among other matters, violations of his constitutional rights because of the late disclosure of the Cass report and the jury's having heard the statement that Harris knew Hicks as "Homicide." The postconviction judge granted an evidentiary hearing on some of the issues presented by Harris' postconviction petition, but denied a hearing on others. In an interlocutory appeal, we reversed the postconviction court's denial of an evidentiary hearing on the issue of prosecutorial misconduct relating to the late disclosure of the Cass report.[6] On remand, a full evidentiary hearing was held and the court ultimately denied postconviction relief. Harris now appeals the postconviction court's order.

Further facts will be set forth below, as necessary to our analysis.

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[5] *Harris I, supra* note 1.

[6] *Harris II, supra* note 2.

ASSIGNMENTS OF ERROR

Harris assigns that the trial court erred (1) when the trial judge granted the State's motion for recusal based solely on his comments regarding our decision in *Harris I*; (2) in failing to grant postconviction relief on the basis that Harris had been denied his right to a *Jackson v. Denno* hearing on the admissibility of his statement in the Cass report and on the grounds that his statements were used against him at trial to negate an essential point of the defense, in violation of Harris' statutory right to move for suppression of involuntary statements[7] and the 5th, 6th, and 14th Amendments to the U.S. Constitution; (3) in failing to grant postconviction relief based on prosecutorial misconduct in failing to disclose the Cass report in violation of the Due Process Clause of the 14th Amendment and the decision in *Brady v. Maryland* and its progeny; (4) in failing to grant postconviction relief based on a conflict of interest created by George Thompson, who was an associate at the law firm of Fabian & Thielen, where Harris' trial attorney, Emil M. Fabian, worked, leaving the Fabian & Thielen law firm and joining the Douglas County Attorney's office in violation of the 6th and 14th Amendments; and (5) in failing to grant postconviction relief based on the fact that during the representation of Harris by Fabian & Thielen, one of Fabian's associates left that firm and joined the Douglas County Attorney's office in violation of the Nebraska "bright line" rule.

The State cross-appeals, asserting that the postconviction court erred in permitting Harris to amend his postconviction motion to include the conflict of interest claim because such amendment exceeded the order of remand in *Harris II*. Harris moves for summary dismissal of the State's cross-appeal.

STANDARD OF REVIEW

[1] On appeal from a proceeding for postconviction relief, the lower court's findings of fact will be upheld unless such findings are clearly erroneous.[8]

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[7] Neb. Rev. Stat. § 29-115 (Reissue 1995).

[8] *State v. Wagner*, 271 Neb. 253, 710 N.W.2d 627 (2006).

ANALYSIS

Alleged Prejudice Relating to Cass Report

We first address Harris' assignments of error relating to the Cass report. Harris argues that because of the State's prosecutorial misconduct in failing to disclose the Cass report in a timely manner, the jury was allowed to hear testimony as to Harris' inadmissible prejudicial statement that he knew Hicks by his nickname "Homicide." Harris explains that this statement should have been suppressed before being heard by the jury, but because Harris was unaware of the report, he could not make a timely motion to suppress. Harris asserts that his due process rights under the 14th Amendment to the U.S. Constitution were thus violated. He also asserts his Fifth Amendment rights were violated, apparently in reference to the privilege against self-incrimination. We note that although Harris' amended petition for postconviction relief made several allegations of ineffective assistance of trial counsel, Harris does not assign or argue in this appeal that the postconviction court erred in denying these ineffective assistance claims.

[2-4] Postconviction relief is a very narrow category of relief.[9] In a motion for postconviction relief, the defendant must allege facts which, if proved, constitute a denial or violation of his or her rights under the U.S. or Nebraska Constitution, causing the judgment against the defendant to be void or voidable.[10] The appellant in a postconviction proceeding has the burden of alleging and proving that the claimed error is prejudicial.[11]

Harris argues that his constitutional rights were violated, rendering his conviction void or voidable, by invoking the principles (1) requiring a voluntariness hearing under *Jackson v. Denno*, (2) prohibiting nondisclosure of exculpatory evidence under *Brady v. Maryland*, and (3) prohibiting late disclosure of material evidence under Neb. Rev. Stat. § 29-1912 (Reissue 1995). The question of whether a constitutional error has occurred may differ depending upon the constitutional principles

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[9] See *State v. Barnes*, 272 Neb. 749, 724 N.W.2d 807 (2006).

[10] *State v. Moore*, 272 Neb. 71, 718 N.W.2d 537 (2006).

[11] *State v. Brunzo*, 262 Neb. 598, 634 N.W.2d 767 (2001).

invoked. Harris' burden to show that he was prejudiced is the same, regardless of what constitutional provision he is claiming was violated.

Ultimately, the only prejudice which Harris asserts is the fact that the jury heard the statement that Harris knew Hicks as "Homicide." This, in turn, Harris argues, "forced" trial counsel to abandon Harris' theory of defense that Harris and Hicks did not even know each other.[12] Harris does not assert that the late disclosure of the Cass report impeded the ability of defense counsel to timely prepare Harris' defense. Harris' counsel did not make a motion to continue the trial in light of the late-discovered report. In fact, it appears that the contents of the report, if not the existence of the report itself, were already known to the defense. This is only reasonable, given that Harris was a participant in the interview with Cass and presumably knew what happened during it.

Assuming, without deciding, that a constitutional error occurred, Harris has failed to sustain his burden on postconviction review to show that the constitutional error was prejudicial. The statement complained of was that Harris knew Hicks as "Homicide." It is unclear whether this statement was brought forth in an attempt to reconcile testimony as to who "Homicide" was or whether it was meant to establish a relationship between Hicks and Harris. In any event, Harris' attorney, on cross-examination of Cass, clearly established that Harris had indicated to Cass only that he had heard of Hicks and that he knew his nickname was "Homicide." Cass specifically testified during cross-examination that Harris never said he knew Hicks personally. Thus, the cross-examination mitigated any prejudice that might have resulted from the more ambiguous statement made by Cass on direct examination. There is scant evidence that Harris' defense strategy was that Hicks and Harris did not know each other, but, in any event, such a strategy was not irreparably harmed, given the cross-examination.

[5] A court making the prejudice inquiry in a postconviction proceeding must ask if the defendant has met the burden of showing that the decision reached would reasonably likely

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[12] Brief for appellant at 42.

have been different absent the errors.[13] The postconviction court found that there was nothing in the Cass report that could have led to other evidence, to help prepare defense witnesses, or could have been used to impeach a prosecution witness. The postconviction court further concluded that the statement from the report entered into the record did not materially influence the jury. In summary, the postconviction court found that Harris did not suffer any actual prejudice in relation to the late disclosure of the Cass report. We agree. In light of the other evidence presented at trial, including the testimony of Hicks and three witnesses who stated that Harris had admitted to the crime, we conclude that Harris has failed to meet his burden on postconviction to prove that the claimed constitutional errors relating to the Cass report were prejudicial. The postconviction court thus properly denied postconviction relief on the issues pertaining to the Cass report.

Conflict of Interest of Trial Attorneys

Harris also claims that trial counsel's imputed conflict of interest warrants postconviction relief. After our remand of the cause in *Harris II*, the county attorney requested leave to withdraw as counsel for the State and requested the appointment of a special prosecutor. The basis for the request was that Thompson, the associate at the same law firm as the attorney representing Harris at trial, had been hired by the Douglas County Attorney's office. This was the first time that Harris' postconviction counsel was aware of this, and counsel was granted leave to amend the motion for postconviction relief to include claims based on this conflict of interest.

The evidence at the postconviction hearing regarding the conflict of interest was that Thompson was an associate at the firm where Harris' trial attorney worked. Thompson's relationship with the firm was somewhat akin to an office-sharing arrangement. The firm did not actually pay Thompson. Thompson was responsible for bringing his own cases to the firm, and he set his own fee schedule and generated his own income. At the

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[13] *State v. Boppre*, 252 Neb. 935, 567 N.W.2d 149 (1997), *disapproved on other grounds, State v. Silvers*, 255 Neb. 702, 587 N.W.2d 325 (1998).

end of the month, Thompson would pay half of his earnings to the firm and he would keep the other half.

Thompson testified that although he knew that Fabian had been appointed to represent Harris, Thompson never met with Harris, never did any legal work on Harris' case, and did not recall having any confidential information relating to Harris' case. The only connection Thompson had with the case was voluntarily attending a preliminary hearing, in the courtroom gallery, to learn how such matters were handled. Although both Thompson and Fabian stated that it was possible they had informal conversations about Harris' case, neither specifically recalled any such conversation.

In December 1998, Thompson left Fabian & Thielen to accept employment with the juvenile division of the county attorney's office. Thompson primarily worked on termination of parental rights cases. Thompson had no direct contact with the criminal division of the county attorney's office, which was located in a different building from where Thompson worked. Thompson testified that he never discussed the Harris case with anyone in the county attorney's office.

The postconviction court ultimately found that Thompson did not have any confidential information regarding Harris' case. In addition, the postconviction court found that during the entire period in question, Thompson "was effectively screened off" from the entirely separate criminal division of the county attorney's office, located in a different building. The court thus concluded that no actual conflict of interest of the attorneys involved in Harris' trial existed and that there was no basis for postconviction relief.

[6-8] Harris correctly notes that under *Strickland v. Washington*,[14] there is a limited presumption of prejudice if a criminal defendant can show (1) that his counsel actively represented conflicting interests and (2) that an actual conflict of interest adversely affected his lawyer's performance.[15] But

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[14] *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

[15] *Id.* See, also, *Cuyler v. Sullivan*, 446 U.S. 335, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980); *State v. Schneckloth*, 235 Neb. 853, 458 N.W.2d 185 (1990).

Harris' reliance on principles of imputed conflict of interests is misguided. The U.S. Supreme Court, in *Cuyler v. Sullivan*, has held that "the possibility of conflict is insufficient to impugn a criminal conviction."[16] In order to obtain relief in a postconviction action based upon the alleged conflict of interest of trial counsel, the defendant must show an actual, as opposed to an imputed, conflict of interest.[17] We determine that the postconviction court did not clearly err in concluding that no actual conflict of interest was present in this case. As such, Harris has no conflict of interest claim which warrants postconviction relief.

The State's cross-appeal asserts that the postconviction court lacked the power to allow Harris' motion to amend the postconviction petition with the conflict of interest allegations. The State argues that issue was not within the purview of our mandate in *Harris II* remanding the cause for an evidentiary hearing. Having affirmed the denial of postconviction relief on other grounds, we need not reach this issue.

Trial Judge's Recusal

Finally, we address Harris' argument that the court committed reversible error in the postconviction proceedings when the trial judge granted the State's motion to recuse himself from presiding. At a hearing on the recusal motion, the State called a witness who testified that the trial judge had previously expressed his view that this court should have reversed for a new trial in *Harris I.* Also, the trial judge's court reporter testified that the trial judge had expressed his view that we should have granted a new trial in *Harris I* and that the trial judge was inclined "to grant a postconviction relief for the defendant." The court reporter was unsure, however, whether the trial judge's statements referred to the ultimate result of postconviction proceedings, or only to the decision to grant an evidentiary hearing on Harris' petition for postconviction relief. The trial judge

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[16] *Cuyler v. Sullivan, supra* note 15, 446 U.S. at 350.

[17] See, *Com. v. Padden*, 783 A.2d 299 (Pa. Super. 2001); *Newby v. State*, 967 P.2d 1008 (Alaska App. 1998); *State v. Walden*, 861 S.W.2d 182 (Mo. App. 1993). See, also, *State v. Narcisse*, 264 Neb. 160, 646 N.W.2d 583 (2002); *State v. Schneckloth, supra* note 15.

concluded that "a reasonable person might conclude that as the finder of fact in this case, I am predisposed." The trial judge stated that this required him to grant the State's motion, and he accordingly entered an order of recusal. The postconviction action was then reassigned to another judge.

Citing the First Circuit cases of *Blizard v. Frechette*[18] and *In re Union Leader Corporation*,[19] Harris argues that the trial judge had a duty to remain as the judge for the postconviction action absent objective facts requiring his removal. He asserts that the facts alleged at the recusal hearing were insufficient to require his removal. Harris asserts that the trial judge is uniquely situated to understand the issues relating to a postconviction action and that parties must be prevented from too easily obtaining a strategic disqualification.

[9] Because the trial judge is uniquely situated to understand the issues relating to a postconviction action, it is true that we do not condone recusals based on the simple fact that the postconviction judge was also the judge at trial. However, it does not follow that a defendant has a cognizable right to have the trial judge be the judge presiding over a postconviction action. Generally, while a defendant may be entitled to an impartial judge,[20] a defendant does not have the right to have his or her case heard before any particular judge.[21] Harris does not contend that the postconviction judge was not fair and impartial or that the recusal resulted in prejudicial delay.

[10,11] A motion to disqualify a trial judge on account of prejudice is addressed to the sound discretion of the trial court.[22]

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[18] *Blizard v. Frechette*, 601 F.2d 1217 (1st Cir. 1979).

[19] *In re Union Leader Corporation*, 292 F.2d 381 (1st Cir. 1961).

[20] *Ward v. Village of Monroeville*, 409 U.S. 57, 93 S. Ct. 80, 34 L. Ed. 2d 267 (1972).

[21] *Palmore v. United States*, 411 U.S. 389, 93 S. Ct. 1670, 36 L. Ed. 2d 342 (1973); *Sinito v. United States*, 750 F.2d 512 (6th Cir. 1984); *United States v. Braasch*, 505 F.2d 139 (7th Cir. 1974); *Padie v. State*, 566 P.2d 1024 (Alaska 1977); *Lane v. State*, 226 Md. 81, 172 A.2d 400 (1961). Cf. *State v. Gales*, 269 Neb. 443, 694 N.W.2d 124 (2005).

[22] *State v. Terrell*, 220 Neb. 137, 368 N.W.2d 499 (1985).

A judge must be careful not to appear to act in the dual capacity of judge and advocate.[23] We find no abuse of discretion in the trial judge's decision to recuse himself in this case.

CONCLUSION

For the reasons already stated, we affirm the denial of postconviction relief. Harris' motion for summary dismissal of the State's cross-appeal is denied.

AFFIRMED.

HEAVICAN, C.J., not participating.

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[23] *Jim's, Inc. v. Willman*, 247 Neb. 430, 527 N.W.2d 626 (1995), *disapproved on other grounds, Gibilisco v. Gibilisco*, 263 Neb. 27, 637 N.W.2d 898 (2002).

HANNON, Judge, Retired, concurring in part, and in part dissenting.

I agree with the majority's opinion on all of the points considered by the majority's opinion except one. I must dissent from that portion of the opinion which concludes that the prosecutor's conduct was not prejudicial to Jack E. Harris. I understand that this court is bound by the finding of the trial court that the prosecutor did not deliver the report to the defense counsel and that her failure to do so was not deliberate. However, in my opinion, a combination of that unintentional conduct and the method of the prosecutor's direct examination of Officer Leland Cass enabled the State to get before the jury a crucial admission which appeared to be clearly inadmissible.

On direct examination, Cass was allowed to testify that he learned that Harris knew Howard Hicks by his nickname, "Homicide," which is a crucial fact when Harris was claiming he did not know Hicks. Because the prosecutor had not delivered the report which showed Cass learned of that fact as part of a proffer, defense counsel had no way of preventing that evidence from being presented to the jury, but the prosecutor would have had the report and must have interviewed Cass to learn of the basis of his testimony.

Viewed in the light of the other evidence, in my opinion, the admission of this evidence was very prejudicial. Cass' testimony

was that of a disinterested, reputable, and unimpeachable witness of a nonjudicial admission of a party. In my opinion, that is powerful evidence, usually dispositive of the point admitted by a party. An admonishment by the judge that the jury should disregard such evidence would be useless. Without Cass' testimony, the evidence before the jury was that Harris testified he did not have an association with Hicks at the time that Hicks testified that they murdered Jones together. The State had the unsupported testimony of Hicks that he did. Hicks' testimony on his association was weak and unsupported. The testimony that Harris admitted to the crimes was given by three jail inmates with obvious motives to lie.

Without the evidence obtained by the proffer statement, in my opinion, a jury would have difficulty in finding Harris to be guilty beyond a reasonable doubt. Therefore, I think the prosecutor's conduct was prejudicial to Harris' getting a fair trial.

LOREN W. KOCH, APPELLEE AND CROSS-APPELLANT, V. RONALD E. AUPPERLE AND MARY ANN AUPPERLE, APPELLANTS, AND LOWER PLATTE SOUTH NATURAL RESOURCES DISTRICT, INTERVENOR-APPELLANT AND CROSS-APPELLEE.

737 N.W.2d 869

Filed August 3, 2007. No. S-06-264.

1. **Injunction: Equity: Appeal and Error.** An action for injunction sounds in equity. On appeal from an equity action, an appellate court tries factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent of the conclusion reached by the trial court.
2. **Pleadings: Appeal and Error.** As a general rule, an appellate court disposes of a case on the theory presented in the district court.
3. **Jurisdiction: Appeal and Error.** When a lower court lacks the authority to exercise its subject matter jurisdiction to adjudicate the merits of a claim, issue, or question, an appellate court also lacks the power to determine the merits of the claim, issue, or question presented to the lower court.
4. **Jurisdiction: Waters.** Courts have jurisdiction to adjudicate common-law claims involving impairment of water rights.
5. **Administrative Law: Jurisdiction: Claims.** The primary jurisdiction doctrine applies whenever enforcement of a claim, originally cognizable in the courts, requires the resolution of issues that have been placed within the special

competence of an administrative body in accordance with the purposes of a regulatory scheme.

6. **Actions: Jurisdiction: Waters.** Exercise of the primary jurisdiction doctrine is inappropriate in cases involving common-law claims for impairment of water rights, because such actions are traditionally cognizable by the courts without reference to agency expertise or discretion.
7. **Interventions.** The interest required as a prerequisite to intervention under Neb. Rev. Stat. § 25-328 (Cum. Supp. 2006) is a direct and legal interest in the controversy, which is an interest of such character that the intervenor will lose or gain by the direct operation and legal effect of the judgment which may be rendered in the action.
8. **Waters: Real Estate.** The basic concept of riparian rights is that an owner of land abutting a water body has the right to have the water continue to flow across or stand on the land, subject to the equal rights of each owner to make proper use of the water.
9. ____: ____. Riparian rights extend only to the use of the water, not to its ownership; a riparian right is thus said to be usufruct only.
10. ____: ____. One of the most significant maxims of riparianism is that, unlike the rule of the prior appropriation system, there is no priority among riparian proprietors utilizing the supply. All riparian proprietors have an equal and correlative right to use the waters of an abutting stream. Of equal importance with this maxim is that use of the water does not create the riparian right and disuse neither destroys nor qualifies the right.
11. ____: ____. The rights of one riparian landowner vis-a-vis another is determined by examining the reasonableness of each landowner's respective use of the water.
12. **Waters: Proof: Case Disapproved.** To the extent *Brummund v. Vogel*, 184 Neb. 415, 168 N.W.2d 24 (1969), suggests that riparian rights can be asserted without proof of their existence, or that there may be a nonriparian, common-law right to surface water, it is disapproved.

Appeal from the District Court for Cass County: RANDALL L. REHMEIER, Judge. Reversed and remanded with directions.

Steven G. Seglin and Thomas E. Jeffers, of Crosby Guenzel, L.L.P., for appellants and intervenor-appellant.

Stephen D. Mossman, of Mattson, Ricketts, Davies, Stewart & Calkins, for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

STEPHAN, J.

This case involves a water dispute between neighboring landowners. Ronald E. Aupperle and Mary Ann Aupperle, with

the cooperation of the Lower Platte South Natural Resources District (LPSNRD), commenced construction of a small dam to create a farm pond along the banks of an unnamed tributary of Weeping Water Creek in Cass County, Nebraska. Loren W. Koch, a downstream user of the waters of the tributary, sought to enjoin the construction of the dam, and LPSNRD intervened. After a bench trial, the district court for Cass County enjoined the Aupperles from constructing the dam without a device to permit water to pass through the dam so as not to "appreciably diminish" the water which would naturally flow onto Koch's property or materially affect the continuity of such flow. The Aupperles and LPSNRD appeal. Based upon our de novo review, we conclude that Koch was not entitled to injunctive relief.

I. BACKGROUND

In June 2005, Koch filed an action to enjoin the Aupperles from constructing a dam to create a small farm pond on the unnamed tributary. In his verified complaint, Koch asserted that he is a downstream user of the tributary and that in 1989, he dammed the waters of the tributary and developed a pond of approximately 3 acres on his property. The pond is stocked with fish and is appurtenant to Koch's residence. Koch alleged that he also used the stream water to water cattle. He alleged that his pond had been reduced in size over the several years preceding the action due to drought conditions in Cass County. Koch alleged that the Aupperle dam would prevent his pond from filling and deprive him of the use of the stream water for livestock watering. On July 5, the district court entered a temporary injunction preventing the Aupperles from completing construction of their dam. On the same date, Koch posted a $1,000 cash bond.

On July 26, 2005, LPSNRD filed a complaint in intervention and an answer. Koch subsequently filed a motion to strike the complaint in intervention on the basis that LPSNRD lacked a direct and legal interest in the outcome of the controversy. After a hearing on the motion to strike, the district court determined that because LPSNRD had entered into a cost-share arrangement with the Aupperles to provide funds for the dam construction and had been involved in the design and construction stages of

the proposed dam, it had a direct financial interest in the final construction of the dam and pond and was therefore entitled to intervene.

LPSNRD and the Aupperles then filed a motion to dismiss or, in the alternative, to transfer the matter to the Department of Natural Resources (DNR), alleging that that agency had "primary, exclusive, and original jurisdiction to adjudicate the respective surface water rights of the parties." In denying the motion, the district court concluded that it had jurisdiction to determine the action and that the doctrine of primary jurisdiction was not applicable.

At trial, Koch testified that he purchased his property in 1981 and that aside from two brief time periods in the previous 2 years, he had observed a constant flow of water in the tributary. His dam, built in 1989, impounded approximately 40 to 50 acre-feet of water. The pond took approximately a year and a half to fill and seal. In 1990, he stocked the pond with largemouth bass, bluegill, and catfish, and the pond, by the time of trial, had become "one of the best little fishing ponds around."

Koch testified that he used his pond to water his livestock from the time it was constructed until 1997. He had no livestock from 1997 until shortly before trial. He stated that he intended to have a small number of cattle on his property again and that he had recently obtained 7 head; he anticipated having a maximum of 45 head. Although he admitted that he had other water sources for cattle on his property, he testified that he preferred to use the running water from the tributary because "it's the most trouble-free watering you can get for livestock" and was the most convenient source of water for him.

Koch testified that the pond was also used for recreational boating. He also testified that he built his house in 1997 to overlook the pond and had made some improvements on the pond, including the installation of a boat dock. According to Koch, due to drought conditions in the 4 to 5 years preceding the trial, the water level in the pond was down 6 to 8 feet.

Koch testified that he did not obtain permits prior to constructing his dam, but that when he learned that permits were necessary, he made the required permit applications. He was concerned that if the drought continued and the Aupperles were

allowed to construct their pond, no water would pass through to his pond and it would dry up and kill his fish. He requested that the court require a "six-inch draw down" in the Aupperle dam so that water could be passed through the Aupperle structure until Koch's pond was full.

On cross-examination, Koch conceded that he had no appropriative right to use the water in the tributary. He further testified that he wanted all the water in the tributary until his pond was full and that then, the court could authorize upstream impoundment by the Aupperles. He admitted that he had other sources of water that he could use for his livestock, including several other ponds, a well, rural water spigots, and stock tanks. He further admitted that he had not quantified the amount of water he would need for watering his livestock, nor had he analyzed at what point the fish in his pond would be endangered. Koch testified that his dam did not contain a drawdown device similar to the one he sought for the Aupperle dam.

Robert Kalinski testified as an expert on behalf of Koch. Kalinski is a licensed professional civil engineer with bachelor's and master's degrees in geology and a doctorate degree in engineering. Summarized, Kalinski testified that the rate of the ground water-based or spring-based flow in the tributary was greater above the proposed Aupperle dam than it was below the dam. He further testified that the Koch dam had a drainage basin of approximately 260 acres and that the Aupperle basin would take up 178, or approximately 69 percent, of those same acres. Drainage basins are relevant to determining how much precipitation-based runoff will flow into a stream.

Over a continuing foundational objection, Kalinski opined that "significant" spring flows would be eliminated by the construction of the Aupperle dam. He stated that with regard to runoff flows, "just reduction of the drainage basin, particularly during times during years of lower flows, below average precipitation, that that would again significantly reduce the amount of water that was available to flow into . . . Koch's dam." Kalinski testified that during the time the Aupperle pond was filling, there would be little flow to the Koch property.

On cross-examination, Kalinski admitted that the flows in the stream could vary from day to day and location to location and

that the variance could be quite significant. He clarified that his ultimate opinion was that "there's a potential reduction in water that's available to flow to . . . Koch's dam."

The Aupperles and LPSNRD called Michael Jess as an expert witness. Jess has a master's degree in civil engineering and formerly served as the director and deputy director of the Department of Water Resources. Summarized, Jess agreed with Kalinski's calculations regarding drainage basins and streamflows, but disagreed as to the effect of the Aupperle dam. According to Jess, during average precipitation years, the Aupperle dam would not have a significant or substantial effect on the streamflow available to Koch. During times of drought, he opined that neither structure was likely to fill and that thus, the proposed Aupperle dam would not have an adverse effect on Koch's pond. Jess further testified that in times of abundant precipitation, both dams were likely to fill and that the Aupperle dam could serve as flood control. He clarified that his opinions were based solely on precipitation-based runoff and that any spring flows would produce an additional volume of water. Ultimately, Jess testified that based upon a comparison of flow to Koch's dam during drought years, both with the Aupperle dam in existence and without it, the difference in the flow would not be so significant as to make the installation of the Aupperle dam an unreasonable use of the stream water.

Paul Zillig, the assistant manager of LPSNRD, testified that based on data compiled by the Natural Resources Conservation Service, an entity that designed the Aupperle farm pond, there was sufficient water in the tributary to support both ponds. He stated that LPSNRD would not have participated in the Aupperle project had it thought that it would have prevented downstream flows. He testified that virtually all small ponds like the Aupperle pond would at some point reduce downstream flows. He also testified that farm ponds like the Aupperles' are customarily designed without auxiliary passthrough devices, because they are not subject to DNR permit requirements. He explained that the state requires a passthrough device because there is a legal requirement to be able to draw down a pond to 15 acre-feet.

Ronald Aupperle testified that he relied upon the expertise of LPSNRD and the Natural Resources Conservation Service for

the planning and design of his pond. He stated that if he were lawfully directed by the DNR to release flows from his dam, he would comply. On cross-examination, Ronald Aupperle testified that he loved wildlife and trees and that he hoped to eventually establish an arboretum as part of the pond area that school children could visit. He stated that aside from one period during the drought, he had always observed water flowing in the tributary.

On February 10, 2006, the district court entered an order in which it found that both parties intended to use impounded water from the tributary "primarily for aesthetic and recreational purposes with grade stabilization, erosion control, and domestic use (watering cattle) being secondary in nature." The court further found that while both parties intended to use the water for the same purpose, Koch "has priority of appropriation due to the fact that his dam was constructed back in 1989 and has existed since that time." On this basis, the court concluded that "Koch's use of the water from the stream is superior to [the] Aupperles." The district court permanently enjoined the Aupperles from constructing their farm pond "until such time as the dam structure contains a draw-down or similar device which will allow for the passage of water through the dam structure." The Aupperles and LPSNRD filed this timely appeal, and we granted their petition to bypass.[1]

II. ASSIGNMENTS OF ERROR

The Aupperles and LPSNRD assign, restated, that the district court erred in (1) failing to recognize the primary, exclusive, and original jurisdiction of the DNR; (2) failing to apply the doctrine of unclean hands to Koch's claims; (3) granting Koch a surface water appropriation; (4) finding that the Nebraska statutes required them to install an outlet structure in their dam; (5) finding that Koch had a superior right to use the surface water in the unnamed tributary; (6) admitting the expert testimony of Kalinski; (7) finding that Koch met his burden of proof and granting him injunctive relief; (8) failing to award attorney fees, costs, and other damages for an improperly granted injunction; and (9) dismissing LPSNRD's complaint in intervention.

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[1] See Neb. Rev. Stat. § 24-1106(2) (Reissue 1995).

On cross-appeal, Koch assigns that the district court erred in failing to strike LPSNRD's complaint to intervene and corresponding answer.

III. STANDARD OF REVIEW

[1] An action for injunction sounds in equity. On appeal from an equity action, an appellate court tries factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent of the conclusion reached by the trial court.[2]

IV. ANALYSIS

1. Introduction

This is one of two cases on our docket involving the dispute between Koch and the Aupperles regarding their respective rights to water in the unnamed tributary of Weeping Water Creek. From filings in the other case also decided today,[3] we are aware that after the entry of the injunction in this case, the DNR granted Koch's application to impound up to 50.5 acre-feet of water per year on his property. We are also aware from that case that the Aupperles claim a statutory right to impound up to 10 acre-feet of water behind their proposed dam pursuant to Neb. Rev. Stat. § 46-241(2) (Cum. Supp. 2006). Koch's appropriation was not in existence when this case was tried, and the Aupperles claimed no statutory right in this proceeding.

[2] As a general rule, an appellate court disposes of a case on the theory presented in the district court.[4] This case was tried on the theory that by virtue of his "senior use" of waters in the tributary, Koch had common-law rights "to the continued supply of water for his pond as well as riparian rights in its use for agricultural purposes" and that the upstream impoundment by the Aupperles would impair such rights. We limit our de novo

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[2] *Lambert v. Holmberg*, 271 Neb. 443, 712 N.W.2d 268 (2006); *State ex rel. City of Alma v. Furnas Cty. Farms*, 266 Neb. 558, 667 N.W.2d 512 (2003).

[3] *In re Applications of Koch, post* p. 96, 736 N.W.2d 716 (2007).

[4] *Wise v. Omaha Public Schools*, 271 Neb. 635, 714 N.W.2d 19 (2006); *Borley Storage & Transfer Co. v. Whitted*, 271 Neb. 84, 710 N.W.2d 71 (2006).

review to that common-law theory without consideration of any subsequent appropriative or claimed statutory rights.

2. Subject Matter Jurisdiction

[3] We begin by addressing the Aupperles and LPSNRD's claim that the district court was without subject matter jurisdiction because of the "primary, original, and exclusive jurisdiction" of the DNR.[5] When a lower court lacks the authority to exercise its subject matter jurisdiction to adjudicate the merits of a claim, issue, or question, an appellate court also lacks the power to determine the merits of the claim, issue, or question presented to the lower court.[6]

Since 1895, Nebraska law governing appropriation of surface water has been statutory.[7] The DNR regulates surface water appropriations under this statutory scheme.[8] It has statutory authority to "make proper arrangements for the determination of priorities of right to use the public waters of the state" and to fix "[t]he method of determining the priority and amount of appropriation . . . ."[9] The Legislature has given the DNR jurisdiction "over all matters pertaining to water rights for irrigation, power, or other useful purposes except as such jurisdiction is specifically limited by statute."[10] In cases involving disputes arising under this statutory scheme, we have noted that the DNR has "original and exclusive" jurisdiction to hear and adjudicate all matters pertaining to water rights for irrigation

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[5] Brief for appellants at 26.

[6] *Cumming v. Red Willow Sch. Dist. No. 179*, 273 Neb. 483, 730 N.W.2d 794 (2007); *In re Interest of Michael U.*, 273 Neb. 198, 728 N.W.2d 116 (2007).

[7] See, 1895 Neb. Laws, ch. 69, §§ 1 to 69, pp. 244-69; Neb. Rev. Stat. § 46-201 et seq. (Reissue 2004 & Supp. 2005); Richard S. Harnsberger & Norman W. Thorson, Nebraska Water Law & Administration 69-70 (1984).

[8] See *id.* See, also, Neb. Rev. Stat. § 61-201 et seq. (Reissue 2003 & Cum. Supp. 2004); *Spear T Ranch v. Knaub*, 269 Neb. 177, 691 N.W.2d 116 (2005).

[9] § 46-226.

[10] § 61-206(1).

and other purposes, including jurisdiction to cancel and terminate such rights.[11]

[4] But prior to the 1895 appropriation law, the common law determined the rights of riparian landowners.[12] The enactment of the appropriation law did not abolish previously vested riparian rights.[13] In this case, Koch asserts a riparian right which he claims to be superior to that of the Aupperles, thereby entitling him to equitable relief. As we have recently noted, courts have jurisdiction to adjudicate common-law claims involving impairment of water rights.[14] The district court correctly concluded that it had subject matter jurisdiction.

[5,6] The district court was also correct in concluding that the primary jurisdiction doctrine was inapplicable to this case. That doctrine applies whenever enforcement of a claim, originally cognizable in the courts, requires the resolution of issues that have been placed within the special competence of an administrative body in accordance with the purposes of a regulatory scheme.[15] Exercise of the primary jurisdiction doctrine is inappropriate in cases involving common-law claims for impairment of water rights, because such actions are traditionally cognizable by the courts without reference to agency expertise or discretion.[16] Thus, the district court had jurisdiction over the subject matter of this action, and we likewise have jurisdiction over the appeal.

3. Intervention

In his cross-appeal, Koch contends that the district court erred in not striking LPSNRD's complaint to intervene and answer prior to trial. LPSNRD and the Aupperles contend that the

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[11] *State ex rel. Blome v. Bridgeport Irr. Dist.*, 205 Neb. 97, 103, 286 N.W.2d 426, 431 (1979). Accord *Hickman v. Loup River Public Power Dist.*, 173 Neb. 428, 113 N.W.2d 617 (1962).

[12] See *Wasserburger v. Coffee*, 180 Neb. 149, 141 N.W.2d 738 (1966).

[13] *Id.*; Harnsberger & Thorson, *supra* note 7.

[14] See *Spear T Ranch v. Knaub, supra* note 8.

[15] *Id.; In re Interest of Battiato*, 259 Neb. 829, 613 N.W.2d 12 (2000).

[16] See *Spear T Ranch v. Knaub, supra* note 8.

district court erred in dismissing the complaint in intervention in its order of permanent injunction.

Intervention in Nebraska is governed by statute. Neb. Rev. Stat. § 25-328 (Cum. Supp. 2006) provides:

> Any person who has or claims an interest in the matter in litigation, in the success of either of the parties to an action, or against both, in any action pending or to be brought in any of the courts of the State of Nebraska, may become a party to an action between any other persons or corporations, either by joining the plaintiff in claiming what is sought by the complaint, or by uniting with the defendants in resisting the claim of the plaintiff, or by demanding anything adversely to both the plaintiff and defendant, either before or after issue has been joined in the action, and before the trial commences.

The intervention shall be by complaint, "which shall set forth the facts on which the intervention rests."[17]

[7] We have held that these statutes require a party to have a direct and legal interest in the controversy, which is "an interest of such character that the intervenor will lose or gain by the direct operation and legal effect of the judgment which may be rendered in the action."[18] In its complaint in intervention, LPSNRD pled that in February 2003, pursuant to its statutory authority to enter into cost-sharing arrangements with landowners, it entered into an agreement with the Aupperles that provided assistance in the planning and design of the proposed farm pond and "also a cost-share arrangement with [LPSNRD's] paying 60% of the construction cost." It alleged that the estimated cost of the project was $20,000 and that as of the date of the complaint, its staff had expended approximately 200 hours in planning and designing the farm pond. Attached to the complaint was the cost-share agreement entered into between LPSNRD and the Aupperles. LPSNRD alleged that it had a financial interest in the construction of the farm pond and that

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[17] Neb. Rev. Stat. § 25-330 (Cum. Supp. 2006).

[18] *Douglas Cty. Sch. Dist. 0001 v. Johanns*, 269 Neb. 664, 671, 694 N.W.2d 668, 674 (2005).

it had an interest in promoting the implementation of its cost-share program.

The district court determined that LPSNRD had already invested money in the farm pond in terms of labor it paid in the design and planning stage. It further noted that LPSNRD had at risk a contractual obligation to pay 60 percent of the construction cost and that the injunction prevented it from seeking completion of its project. The court determined that LPSNRD had a direct and legal interest sufficient to allow it to intervene. We agree with the court's reasoning and conclusion.

In its complaint in intervention, LPSNRD prayed for an order vacating the temporary injunction, dismissing Koch's complaint, taxing costs to Koch, and for attorney fees. We regard the dismissal of the complaint in intervention at the conclusion of the case as a denial of such relief, inasmuch as the court decided the case in Koch's favor. Whether this decision on the merits was in error, as LPSNRD and the Aupperles contend, is discussed below.

4. Merits

(a) Did Koch Have Superior Right to Water in Tributary?

[8-10] At common law, persons owning land bounding upon a watercourse were called "riparian proprietors" and possessed certain rights to use the water as an incident of ownership of the land.[19] "The basic concept of riparian rights is that an owner of land abutting a waterbody has the right to have the water continue to flow across or stand on the land, subject to the equal rights of each owner to make proper use of the water."[20] As explained by one commentator:

> The doctrine of riparian rights is based upon the proposition that each riparian has a right to make a beneficial use of the water of the stream for any purpose so long as such use does not unreasonably interfere with the enjoyment of the same privilege by other riparians.[21]

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[19] James A. Doyle, *Water Rights in Nebraska*, 20 Neb. L. Rev. 1, 2 (1941).

[20] 1 Waters and Water Rights § 7.01 at 7-2 (Robert E. Beck ed., 2001).

[21] Doyle, *supra* note 19, at 13.

The riparian theory developed in England, at a time and in a climate where there was little use of water for irrigation.[22] Riparian rights extend only to the use of the water, not to its ownership; a riparian right is thus said to be usufruct only.[23] "One of the most significant maxims of riparianism is that, unlike the rule of the prior appropriation system, there is no priority among riparian proprietors utilizing the supply. All riparian proprietors have an equal and correlative right to use the waters of an abutting stream."[24] Of "equal importance" with this maxim is that "use of the water does not create the [riparian] right and disuse neither destroys nor qualifies" the right.[25]

In *Meng v. Coffee*,[26] a dispute among riparian landowners, this court noted that the common law considered running water "*publici juris*,"

> and while it will not permit any one man to monopolize all the water of a running stream when there are other riparian owners who need and may use it also, neither does it grant to any riparian owner an absolute right to insist that every drop of the water flow past his land exactly as it would in a state of nature.

We further noted that the common-law rule gives a riparian landowner "only a right to the benefit and advantage of the water flowing past his land so far as consistent with a like right in all other riparian owners."[27] The purpose of the common-law rule was "to secure equality in the use of the water by riparian owners, as near as may be, by requiring each to exercise his rights reasonably and with due regard to the right of other riparian

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[22] Harnsberger & Thorson, *supra* note 7.

[23] *Crawford Co. v. Hathaway*, 67 Neb. 325, 93 N.W. 781 (1903), *overruled on other grounds, Wasserburger v. Coffee, supra* note 12; Harnsberger & Thorson, *supra* note 7.

[24] Harnsberger & Thorson, *supra* note 7 at 24.

[25] *Id.* at 25.

[26] *Meng v. Coffee*, 67 Neb. 500, 503, 93 N.W. 713, 714 (1903).

[27] *Id.* at 505, 93 N.W. at 714.

owners to apply the water to the same or to other purposes."[28] Under the common law, "[i]f the rights of the upper owner in the water are no more than those of the lower owner, they are at the same time no less."[29]

[11] Applying these principles, we conclude as a matter of law that Koch could not have acquired any "senior" riparian right by constructing his dam in 1989. Any riparian right he may have to use water in the tributary would be equal and correlative to the rights of other riparian proprietors. The rights of one riparian landowner vis-a-vis another is determined by examining the reasonableness of each landowner's respective use of the water.[30]

(b) Did Koch Meet His Burden of Proof for Entitlement to Injunctive Relief?

Our determination that Koch did not have a senior right does not necessarily resolve the appeal. As a part of our de novo review, we must still address the question of whether he proved facts sufficient to entitle him to injunctive relief under the applicable legal principles.

(i) Existence of Riparian Right

The first question we must decide is whether Koch has a riparian right, inasmuch as "a person may not be heard to complain, either in a court of law or before an administrative tribunal, as to the infringement of a right which in fact he does not possess."[31] In *Osterman v. Central Nebraska Public Power and Irrigation District*, parties claiming riparian rights objected to applications made by an irrigation district for the allowance of water rights in the North Platte and Platte Rivers. In an appeal

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[28] *Id.* at 513, 93 N.W. at 718.

[29] *Id.* at 514-15, 93 N.W. at 718.

[30] See, *Meng v. Coffee*, *supra* note 26; Restatement (Second) of Torts § 850A (1979); Harnsberger & Thorson, *supra* note 7.

[31] *Osterman v. Central Nebraska Public Power and Irrigation District*, 131 Neb. 356, 360, 268 N.W. 334, 336 (1936), *overruled on other grounds, Wasserburger v. Coffee, supra* note 12, and *Little Blue N.R.D. V. Lower Platte North N.R.D.*, 206 Neb. 535, 294 N.W.2d 598 (1980).

from an administrative decision granting the applications, the irrigation district argued that the objectors did not in fact possess riparian rights. We noted evidence that the objectors were representatives of titles for lands bordering the Platte River which were initiated by settlement as early as 1857 and for which patents had been issued earlier than 1870. We concluded that the objectors therefore possessed common-law rights of riparian owners of land.

In *Wasserburger v. Coffee*,[32] parties claiming riparian rights sought to enjoin upstream irrigators who held appropriation permits, claiming that the irrigation exhausted streamflow necessary to water cattle. The irrigators denied that the plaintiffs possessed riparian rights. In resolving this issue, we first examined whether the legislative adoption of the prior appropriation doctrine abrogated all riparian rights. We concluded that while the 1895 irrigation act abrogated the common law of riparian rights in favor of the current system of appropriation, it did not abolish existing riparian rights with respect to parcels of land severed from the public domain prior to April 4, 1895, the effective date of the act. Such rights could be established by showing that "by common law standards the land was riparian immediately prior to the effective date" of the act and that it had not subsequently lost its riparian status as a result of severance.[33] Thus, riparian rights which had vested prior to the effective date of the 1895 act were preserved, but no new riparian rights could be acquired after that date.[34] The 1895 act denied "the common law doctrine as to all riparian land not privately owned" as of its effective date.[35]

There is no evidence in this record establishing when Koch's property was severed from the public domain or whether any predecessor in title held vested riparian rights prior to April 4, 1895. Koch argues that such proof is not required under the

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[32] *Wasserburger v. Coffee, supra* note 12.

[33] *Id.* at 158, 141 N.W.2d at 745.

[34] Harnsberger & Thorson, *supra* note 7; 1 Waters and Water Rights, *supra* note 20, § 8.02(c).

[35] Doyle, *supra* note 19 at 7.

reasoning of *Brummund v. Vogel*.[36] The plaintiff in that case, claiming riparian rights, sought to enjoin an upstream appropriator from damming a creek which provided the main source of water for the plaintiff's cattle. Our opinion specifically stated that the plaintiff neither pled nor proved

> facts entitling him to vested riparian rights under the common law which might precede April 4, 1895, the effective date of the irrigation act of 1895, which is the cut-off date for the acquisition of riparian rights and the invoking of the law of priority of application giving the better right as between those using the water for the same or different purposes, and preferring domestic use over other uses in cases of insufficient water.[37]

Nevertheless, the opinion goes on to recognize that the right of the downstream user to "use water" from the stream "for domestic purposes" was "superior" to the upstream appropriator's rights.[38] However, because the downstream user failed to meet his burden of proof, injunctive relief was denied.

Brummund has been criticized as the cause of "a good deal of uncertainty to the law of riparian-appropriator disputes."[39] The commentators note:

> If domestic users are protected against all others by virtue of the preference laws, then the value of an appropriator's right is considerably diminished. The situation becomes more aggravated if anyone watering livestock (even a person having no protected interest under any known Nebraska law) is given a valid claim to water and the right to enjoin appropriators.
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> . . . Further, expanding livestock watering rights beyond riparians, as *Brummund* may have done, works a substantial change in Nebraska water law, according to many

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[36] *Brummund v. Vogel*, 184 Neb. 415, 168 N.W.2d 24 (1969).

[37] *Id.* at 420, 168 N.W.2d at 27.

[38] *Id.* at 421, 168 N.W.2d at 28.

[39] Harnsberger & Thorson, *supra* note 7 at 111.

authorities. Thus, to the extent that *Brummund* suggests such an extension, it is wrong.[40]

[12] We agree. Prior to *Brummund*, we noted that the "dual administration of water resources under the doctrines of riparian rights and of prior appropriation" results in a "hydra of perplexity" and that the "two methods are incompatible."[41] Our case law prior to *Brummund* characterized surface water rights as either appropriative or riparian and required proof of any claimed riparian right.[42] The departure in *Brummund* from that course was unwise. To the extent *Brummund* suggests that riparian rights can be asserted without proof of their existence, or that there may be a nonriparian, common-law right to surface water, it is disapproved.

The record in this case does not establish that either Koch or the Aupperles held riparian rights. They are simply owners of adjoining tracts of land through which the tributary flows, with Koch's land situated downstream of that of the Aupperles. Koch, as the party seeking injunctive relief, had the burden to show that the proposed Aupperle dam would infringe on his rights. Because he has not even demonstrated the existence of a common-law riparian right, he clearly is not entitled to injunctive relief. Accordingly, we need not analyze the reasonableness of the use by each party of the water flowing in the tributary.[43] However, we note that the record fully supports the finding of the district court that both parties intended to use water in the tributary "primarily for aesthetic and recreational purposes with grade stabilization, erosion control, and domestic use (watering cattle) being secondary in nature."

(ii) Flowthrough Device

The district court enjoined the Aupperles from constructing their dam "until such time as the dam structure contains a

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[40] *Id.* at 111-12.

[41] *Wasserburger v. Coffee, supra* note 12, 180 Neb. at 151, 141 N.W.2d at 741.

[42] See, e.g., *Wasserburger v. Coffee, supra* note 12; *Osterman v. Central Nebraska Public Power and Irrigation District, supra* note 31.

[43] See, *Meng v. Coffee, supra* note 26; Harnsberger & Thorson, *supra* note 7.

draw-down or similar device which will allow for the passage of water through the dam structure." To the extent that this reasoning implies that the Aupperle dam was legally required to include a flowthrough device, we examine it as a part of our de novo review of the propriety of injunctive relief.

Section 46-241(1) requires persons intending to construct and operate a storage reservoir to obtain a permit from the DNR. Section 46-241(5) requires that such dams be constructed with a passthrough device. However, § 46-241(2) exempts from the permit requirement "[a]ny person intending to construct an on-channel reservoir with a water storage impounding capacity of less than fifteen acre-feet." The record reflects that the Aupperle dam was designed to fall within this exemption. According to the DNR's regulations, installation of a passthrough device is required only when the dam structure being built is subject to the DNR's review and approval, i.e., when a permit is required to construct the dam.[44] Because the Aupperle dam is, by virtue of its impoundment capacity, exempt from the permit requirement, we conclude that there is no statutory or regulatory requirement that its design must include a passthrough device.

(iii) Conclusion

Based upon our de novo review of the record, we conclude for the reasons discussed that Koch was not entitled to injunctive relief. Accordingly, we need not address the assignments of error pertaining to the doctrine of unclean hands or the admissibility of expert testimony.

5. Damages, Costs, and Attorney Fees

LPSNRD and the Aupperles assign error by the district court in failing "to award attorney's fees, costs and other damages to the [LPSNRD] and [the] Aupperles for an improperly granted injunction." Obviously, the district court could not have addressed this issue because it concluded that injunctive relief was proper and granted such relief. Because we vacate the permanent injunction herein, we remand the cause to the district court with directions to determine in the first instance

[44] See 457 Neb. Admin. Code, ch. 13, § 001 (2005).

whether LPSNRD and the Aupperles are entitled to recover attorney fees and damages from Koch under the injunction bond or otherwise.[45]

V. CONCLUSION

Based upon our de novo review, we conclude that Koch was not entitled to injunctive relief. We therefore reverse the judgment of the district court and remand the cause with directions to vacate the injunction, dismiss Koch's verified complaint, and determine whether the Aupperles and LPSNRD are entitled to recover damages or attorney fees as a result of the injunction issued below.

REVERSED AND REMANDED WITH DIRECTIONS.

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[45] See *Robertson v. School Dist. No. 17*, 252 Neb. 103, 560 N.W.2d 469 (1997).

OMAHA POLICE UNION LOCAL 101, IUPA, AFL-CIO, APPELLEE AND CROSS-APPELLANT, V. CITY OF OMAHA, A MUNICIPAL CORPORATION, AND THE CHIEF OF POLICE, THOMAS WARREN, APPELLANTS AND CROSS-APPELLEES.

736 N.W.2d 375

Filed August 3, 2007. No. S-06-403.

1. **Commission of Industrial Relations: Appeal and Error.** Any order or decision of the Commission of Industrial Relations may be modified, reversed, or set aside by the appellate court on one or more of the following grounds and no other: (1) if the commission acts without or in excess of its powers, (2) if the order was procured by fraud or is contrary to law, (3) if the facts found by the commission do not support the order, and (4) if the order is not supported by a preponderance of the competent evidence on the record considered as a whole.
2. **Commission of Industrial Relations: Evidence: Appeal and Error.** In an appeal from a Commission of Industrial Relations order regarding prohibited practices stated in Neb. Rev. Stat. § 48-824 (Reissue 2004), an appellate court will affirm a factual finding of the commission if, considering the whole record, a trier of fact could reasonably conclude that the finding is supported by a preponderance of the competent evidence.
3. **Labor and Labor Relations.** A matter which is of fundamental, basic, or essential concern to an employee's financial and personal concern may be considered as

involving working conditions and is mandatorily bargainable even though there may be some minor influence on management prerogative.

4. ____. Company rules relating to employee safety and work practices involve conditions of employment.
5. ____. Management prerogatives include the right to hire, to maintain order and efficiency, to schedule work, and to control transfers and assignments.
6. **Commission of Industrial Relations: Constitutional Law.** The Commission of Industrial Relations has no authority to vindicate constitutional rights.
7. **Commission of Industrial Relations: Administrative Law.** The Commission of Industrial Relations is not a court and is in fact an administrative body performing a legislative function. It has only those powers delineated by statute, and should exercise that jurisdiction in as narrow a manner as may be necessary.
8. **Labor and Labor Relations: Public Officers and Employees: Civil Rights.** Public employees belonging to a labor organization have the protected right to engage in conduct and make remarks, including publishing statements through the media, concerning wages, hours, or terms and conditions of employment. However, employees lose the statutory protection of the Industrial Relations Act if the conduct or speech constitutes "flagrant misconduct." Flagrant misconduct includes, but is not limited to, statements or actions that (1) are of an outrageous and insubordinate nature, (2) compromise the public employer's ability to accomplish its mission, or (3) disrupt discipline. It would also include conduct that is clearly outside the bounds of any protection, including, for example, assault and battery or racial discrimination.
9. **Commission of Industrial Relations: Labor and Labor Relations: Civil Rights.** The Commission of Industrial Relations must balance the employee's right to engage in protected activity, which permits some leeway for impulsive behavior, against the employer's right to maintain order and respect for its supervisory staff. Factors that the commission may consider, but would not necessarily be determinative, include: (1) the place and subject matter of the conduct or speech, (2) whether the employee's conduct or speech was impulsive or designed, (3) whether the conduct or speech was provoked by the employer's conduct, and (4) the nature of the intemperate language or conduct.
10. **Appeal and Error.** An appellate court may, at its discretion, discuss issues unnecessary to the disposition of an appeal where those issues are likely to recur during further proceedings.

Appeal from the Commission of Industrial Relations. Affirmed in part, and in part reversed and remanded with directions.

Paul D. Kratz, Omaha City Attorney, and Bernard J. in den Bosch for appellants.

Thomas F. Dowd, of Dowd, Howard & Corrigan, L.L.C., for appellee.

WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

STEPHAN, J.

This appeal presents the issue of whether a public employer engages in a prohibited practice under the Industrial Relations Act (the Act)[1] by taking disciplinary action against public employees belonging to a labor organization for statements made and published by those employees. In this action commenced by Omaha Police Union Local 101 (Union) against the City of Omaha and Omaha chief of police Thomas Warren (collectively the appellants), the Commission of Industrial Relations (CIR) concluded that disciplinary action taken against a police officer who authored an article in a Union publication constituted a prohibited practice. In reaching this conclusion, the CIR used a legal standard applied in private sector labor relations cases. We conclude that the CIR should have applied a different standard utilized by courts and administrative agencies to resolve protected speech issues in public sector employment cases.

I. BACKGROUND

1. ANDERSEN INVESTIGATION

On December 14, 2004, a Union meeting was held for the member police officers of the Omaha Police Department (OPD). During the meeting, OPD Sgt. Timothy Andersen, then president of the Union, was asked a question concerning how OPD calculated 911 emergency dispatch service response times. Andersen opined that the method by which OPD calculated response times was misleading. In expressing his view, Andersen provided a hypothetical example on how police officers were trained by OPD to respond to certain high priority 911 calls that required response by two officers.

Several days after the meeting, reports of Andersen's statements were relayed to Warren. On December 20, 2004, Warren initiated an Internal Affairs (IA) investigation of Andersen in which he sought to determine exactly what Andersen said at the

[1] Neb. Rev. Stat. §§ 48-801 to 48-838 (Reissue 2004).

December 14 meeting and whether Andersen had advised officers to disregard departmental standard operating procedures.

In June 2005, IA determined that Andersen had not violated departmental procedures and had not acted unprofessionally. Warren adopted those findings and took no disciplinary action against Andersen.

2. Housh Investigation and Discipline

In response to the events involving Andersen, OPD Sgt. Kevin Housh wrote an article in the February 2005 issue of the Union newspaper, "The Shield," which is distributed to members of the Union as well as to members of the community. Housh's article was generally critical of the standard operating procedures for two-officer 911 calls and the manner in which the city and OPD calculated response time. Housh characterized city officials as "[a] bunch of grown men and women, supposedly leaders, acting like petty criminals trying to conceal some kind of crime."[2] He also stated that "[t]hey refuse to do it, they know they've screwed up, and rather than admitting guilt, they (whoever they are) will make history and try to control what is said/revealed during union meetings regarding response time."[3]

On February 7, 2005, Warren initiated an IA investigation of Housh based on his article in The Shield. Describing the language from the article as derogatory and inflammatory, Warren alleged that Housh's conduct constituted gross disrespect and insubordination and was unbecoming an officer, in violation of OPD rules of conduct.

After conducting its investigation, IA determined that the unprofessional conduct allegation against Housh should be sustained. On February 24, 2005, Warren adopted that finding. However, contrary to other recommendations for discipline, Warren terminated Housh's employment. The Union subsequently appealed Housh's termination to the city personnel board. Thereafter, the city and the Union reached an agreement whereby Housh was reinstated to OPD but was required to,

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[2] Kevin Housh, *This 'n That*, The Shield (Omaha Police Union Local 101, I.U.P.A., AFL-CIO), Feb. 2005, at 1.

[3] *Id.*

among other things, serve a 20-day suspension without pay and discontinue working on the emergency response unit.

3. Meeting With Warren

On August 22, 2005, two Union representatives met privately with Warren in an attempt to discuss the appropriate methods of handling future Union speech issues as well as OPD's handling of Andersen's case. The Union claims that it sought assurances from Warren that he would not interfere with, investigate, or discipline off-duty officers for their conduct at Union meetings or in Union publications. Warren refused to discuss Andersen's case, as it was still an ongoing controversy. Warren also purportedly stated that he retained the right "to initiate an internal investigation on off duty union activities if he determines they involve either insubordination or gross disrespect of himself or his administration or false comments [or] slander." But, Warren also commented that he was not trying to censor anyone and that he would only initiate an IA investigation of an officer if he believed there was merit to such investigation.

4. CIR Proceedings

On September 2, 2005, the Union filed a petition with the CIR against the appellants. The Union claimed that the appellants' investigations of Andersen and Housh and termination of Housh's employment had "chilled" other Union members' expression of opinions at Union meetings and in the Union publication. As a result, the Union alleged that the appellants had engaged in prohibited labor practices under § 48-824(2)(a) by interfering with, restraining, and coercing Union members in their exercise of rights granted under § 48-837. The Union prayed that the appellants should be restrained from interfering with Union members' rights to express their opinions at Union meetings or in Union publications relating to terms and conditions of their employment, the city's administration, and OPD's management. The Union also sought attorney fees and any other appropriate remedy within the CIR's jurisdiction. The appellants answered by denying the specific allegations in the petition and by raising several affirmative defenses, including a lack of CIR jurisdiction.

After conducting a trial in which testimony was heard and evidence was received, the CIR issued a written order granting a portion of the relief sought by the Union. The CIR found that numerous employees had indicated that Warren's actions had limited their involvement with the Union, including decreased meeting attendance and fewer articles submitted for publication. However, the CIR concluded that the IA investigation of Andersen did not constitute an interference, restraint, or coercion in the exercise of the right to participate in Union activities.

As to Housh, the CIR reasoned that his article was a protected union activity if it was "concerted activity" falling under the protection of § 48-824(2)(a). Looking to federal labor cases for guidance, the CIR noted that employee speech was a protected concerted activity if it related to working conditions. It then determined that Housh's article pertained to officer safety, which was a working condition and a mandatory subject of bargaining. The CIR also found, based on federal labor case law, that an employee only loses protection for speech that is deliberately or recklessly untrue. The CIR concluded that "Housh's statements, while certainly constituting intemperate, abusive and insulting rhetorical hyperbole, fall short of deliberate or reckless untruth. The comments were made in a union publication in the context of a management/union disagreement, and they were therefore protected from interference, restraint or coercion by management."

As a remedy, the CIR ordered the appellants "not to interfere in any way" with statements made by employees in the Union publication which did not violate the standard of deliberate or reckless untruth. The appellants were also ordered to place a statement in the Union newsletter indicating that they would recognize the Union members' rights to protected activity. The appellants perfected this timely appeal, which we moved to our docket pursuant to our statutory authority to regulate the caseloads of the appellate courts of this state.[4]

[4] See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

II. ASSIGNMENTS OF ERROR

The appellants assign, restated, that the CIR erred in finding that (1) the calculation of response times was a mandatory bargaining issue and (2) all speech by employees in the Union newspaper is protected unless deliberately or recklessly untrue.

On cross-appeal, the Union assigns, restated, that the CIR erred in failing to (1) find the appellants' investigation of Andersen was a prohibited practice requiring the deletion of all investigation records, (2) make Housh whole for the losses he sustained from the appellants' prohibited practice, and (3) award the Union reasonable attorney fees.

III. STANDARD OF REVIEW

[1] Any order or decision of the CIR may be modified, reversed, or set aside by the appellate court on one or more of the following grounds and no other: (1) if the CIR acts without or in excess of its powers, (2) if the order was procured by fraud or is contrary to law, (3) if the facts found by the CIR do not support the order, and (4) if the order is not supported by a preponderance of the competent evidence on the record considered as a whole.[5]

[2] In an appeal from a CIR order regarding prohibited practices stated in § 48-824, an appellate court will affirm a factual finding of the CIR, if, considering the whole record, a trier of fact could reasonably conclude that the finding is supported by a preponderance of the competent evidence.[6]

IV. ANALYSIS

1. City's Appeal

(a) Mandatory Subject of Collective Bargaining

The CIR has jurisdiction over certain "industrial disputes involving governmental service."[7] As used in the Act, the term

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[5] See *Hyannis Ed. Assn. v. Grant Cty. Sch. Dist. No. 38-0011*, 269 Neb. 956, 698 N.W.2d 45 (2005).

[6] *Crete Ed. Assn. v. Saline Cty. Sch. Dist. No. 76-0002*, 265 Neb. 8, 654 N.W.2d 166 (2002).

[7] § 48-810.

"industrial dispute" includes "any controversy concerning terms, tenure, or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, or refusal to discuss terms or conditions of employment."[8] Wages, hours, and other terms and conditions of employment or any question arising thereunder are considered to be mandatory subjects of bargaining under the Act.[9]

In their first assignment of error, the appellants assert that the CIR erred in finding that "[t]he calculation of response times is a working condition which affects safety and is a mandatory subject of bargaining." The appellants contend that the calculation of response time is not a working condition, but, rather, a mechanism for measuring departmental effectiveness. They argue that such calculation is merely a statistical tool that OPD management uses to evaluate OPD's ability to respond to 911 emergency calls. The appellants argue that changing the method of calculation would not affect OPD's service to the public or officer safety, but would impair the ability of OPD to compare future response times with past response times. The appellants thus contend that as an evaluative tool, the response time calculation is solely within management's prerogative.

The Union, on the other hand, argues that calculation of response time has broader implications which affect departmental staffing. The Union contends that if response time is calculated in the manner it claims is proper, the calculations would reveal longer 911 response times, which may indicate that OPD staffing is deficient. The Union contends that these staffing issues have an effect on officer safety, a condition of employment.

[3-5] A matter which is of fundamental, basic, or essential concern to an employee's financial and personal concern may be considered as involving working conditions and is mandatorily bargainable even though there may be some minor

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[8] § 48-801(7).

[9] *Crete Ed. Assn. v. Saline Cty. Sch. Dist. No. 76-0002, supra* note 6. See § 48-816(1).

influence on management prerogative.[10] Company rules relating to employee safety and work practices involve conditions of employment.[11] Conversely, management prerogatives include the right to hire, to maintain order and efficiency, to schedule work, and to control transfers and assignments.[12] Based on our review of the record, we conclude that the CIR's finding that the calculation of response times implicates officer safety is supported by the evidence. On the surface, both parties are arguing in terms of the calculation of response times. But the essential nature of their arguments is whether an OPD response to a two-officer 911 call is completed when the first officer arrives at the call location or when the second officer arrives at the call location. Thus, the real issue can be understood to involve how officers should respond to two-officer 911 calls, not merely how OPD calculates their response time. Under this broader reading of the issue, which the CIR deemed appropriate, it can be fairly said that response time does relate to officer safety and, thus, the manner in which it is determined affects a condition of employment.

(b) Protected Union Speech

Section 48-824(2) of the Act states: "It is a prohibited practice for any employer or the employer's negotiator to: (a) Interfere with, restrain, or coerce employees in the exercise of rights granted by the Industrial Relations Act." Section 48-837 provides that "[p]ublic employees shall have the right to form, join, and participate in . . . any employee organization of their own choosing [and] shall have the right to be represented by employee organizations to negotiate collectively with their public employers in the determination of their terms and conditions

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[10] See *Metro. Tech. Com. Col. Ed. Assn. v. Metro. Tech. Com. Col. Area*, 203 Neb. 832, 281 N.W.2d 201 (1979).

[11] See *Norfolk Educ. Assn. v. School Dist. of Norfolk*, 1 C.I.R. No. 40 (1971) (citing *N. L. R. B. v. Gulf Power Company*, 384 F.2d 822 (5th Cir. 1967)).

[12] See, *Lincoln Firefighters Assn. v. City of Lincoln*, 253 Neb. 837, 572 N.W.2d 369 (1998), *overruled on other grounds, Hyannis Ed. Assn. v. Grant Cty. Sch. Dist. No. 38-0011, supra* note 5; *School Dist. of Seward Education Assn. v. School Dist. of Seward*, 188 Neb. 772, 199 N.W.2d 752 (1972).

of employment . . . .” As framed by the parties, the prohibited practice issue before the CIR was whether the actions taken by Warren against Andersen and Housh and the comments made by Warren to Union leadership interfered with, restrained, or coerced employees from exercising their right to participate in the Union.

(i) NLRA Speech Standard

The CIR determined that § 48-824(2)(a) is “almost identical” to § 8(a)(1) of the National Labor Relations Act (NLRA).[13] Recognizing that decisions under the NLRA can be helpful in interpreting the Act, but are not binding,[14] the CIR looked to decisions by the National Labor Relations Board for guidance.

Under the NLRA, employees have the right to engage in “concerted activities for the purpose of . . . mutual aid or protection.”[15] The National Labor Relations Board construes this right to extend protection to employee speech which relates to working conditions.[16] While not condoned by the board, employees may use “‘intemperate, abusive, or insulting language without fear of restraint or penalty if the speaker believes such rhetoric to be an effective means to make a point.’”[17] But protection of speech under the NLRA is not unrestricted; it is lost when work-related speech constitutes a “deliberate or reckless untruth.”[18]

Importantly, the scope of NLRA coverage is limited. By its own terms, the NLRA does not apply to the federal government or any state or municipal governments in their capacities

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[13] See 29 U.S.C. § 151 et seq. (2000).

[14] *Crete Ed. Assn. v. Saline Cty. Sch. Dist. No. 76-0002, supra* note 6.

[15] 29 U.S.C. § 157.

[16] See *Eastex, Inc. v. NLRB*, 437 U.S. 556, 98 S. Ct. 2505, 57 L. Ed. 2d 428 (1978).

[17] *Phoenix Transit System*, 337 N.L.R.B. 510, 514 (2002) (citing *Letter Carriers v. Austin*, 418 U.S. 264, 94 S. Ct. 2770, 41 L. Ed. 2d 745 (1974)).

[18] *Id.* (citing *Linn v. Plant Guard Workers*, 383 U.S. 53, 86 S. Ct. 657, 15 L. Ed. 2d 582 (1966)).

as employers.[19] Instead, it applies only to private sector employment.[20]

(ii) Public Sector Employees

In this case, the CIR applied the NLRA "deliberate and reckless untruth" standard in determining whether Housh's speech exceeded the protections granted under the Act. But, public sector employees, like OPD police officers, are not guaranteed the rights and protections of the NLRA. Thus, we are presented with the legal question of whether the Act guarantees similar rights and protections to public sector employees in Nebraska. While the language of the Act is broad enough to encompass the rights granted under the NLRA, we are not persuaded that the "deliberate or reckless untruth" standard is the appropriate method to analyze the speech of public sector employees.

The Act has a somewhat different focus than the NLRA. Although couched in broad Commerce Clause language, the NLRA attempts to rectify the "inequality of bargaining power between employees . . . and employers" by providing certain rights to employees.[21] The Act, on the other hand, focuses almost exclusively on protecting the public.

> The continuous, uninterrupted and proper functioning and operation of the governmental service . . . to the people of Nebraska are hereby declared to be essential to their welfare, health and safety. It is contrary to the public policy of the state to permit any substantial impairment or suspension of the operation of governmental service . . . by reason of industrial disputes therein. It is the duty of the State of Nebraska to exercise all available means and every power at its command to prevent the same so as to protect

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[19] See 29 U.S.C. § 152(2).

[20] See *NLRB v. Natural Gas Utility District*, 402 U.S. 600, 91 S. Ct. 1746, 29 L. Ed. 2d 206 (1971) (holding political subdivision exemption limited to entities either (1) created directly by state, so as to constitute departments or administrative arms of government, or (2) administered by individuals responsible to public officials or to general electorate).

[21] 29 U.S.C. § 151.

> its citizens from any dangers, perils, calamities, or catastrophes which would result therefrom. It is therefor further declared that governmental service . . . are clothed with a vital public interest and to protect same it is necessary that the relations between the employers and employees in such industries be regulated by the State of Nebraska to the extent and in the manner hereinafter provided.[22]

While the Act does provide public employees some of the same rights granted under the NLRA, it also explicitly removes other rights utilized by private sector employees, most notably the right to strike.[23] Therefore, we view the Act not only as an attempt to level the employment playing field, but also as a mechanism designed to protect the citizens of Nebraska from the effects and consequences of labor strife in public sector employment. As a result, we believe the NLRA's "deliberate and reckless untruth" standard is inappropriate in the context of public sector employment.

We are also cognizant of the fact that the labor conflict in this case involves parties serving a special purpose to the public. As a police department, OPD operates as a paramilitary organization charged with maintaining public safety and order.[24] Federal courts have recognized this special purpose, finding that these employers should be given "more latitude in their decisions regarding discipline and personnel regulations than an ordinary government employer."[25]

For instance, in *Tindle v. Caudell*,[26] a police officer was disciplined for wearing an offensive costume to an off-duty, union-sponsored Halloween party. In upholding the officer's discipline, the court recognized that members of police departments "may be subject to stringent rules and regulations that could not apply

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[22] § 48-802(1).

[23] See § 48-802(2) and (3).

[24] See *Tindle v. Caudell*, 56 F.3d 966 (8th Cir. 1995).

[25] *Id.* at 971. Accord *Crain v. Board of Police Com'rs*, 920 F.2d 1402 (8th Cir. 1990). See *Hughes v. Whitmer*, 714 F.2d 1407 (8th Cir. 1983).

[26] *Tindle v. Caudell, supra* note 24.

to other government agencies."[27] Likewise, in *Crain v. Board of Police Com'rs*,[28] a police officer was discharged for violating the police department's sick leave regulations. In analyzing the regulations, the court noted that "[r]egulations limiting even those rights guaranteed by the explicit language of the Bill of Rights are reviewed more deferentially when applied to certain public employees than when applied to ordinary citizens."[29] Moreover, in *Hughes v. Whitmer*,[30] a state trooper was transferred in order to resolve a debilitating morale problem created in part by the trooper's accusations involving superior officers. Acknowledging the state patrol's paramilitary status, the court found that "[m]ore so than the typical government employer, the Patrol has a significant government interest in regulating the speech activities of its officers in order 'to promote efficiency, foster loyalty and obedience to superior officers, maintain morale, and instill public confidence in the law enforcement institution.'"[31] We agree with the reasoning of the federal courts and conclude that the NLRA's "deliberate or reckless untruth" standard is inappropriate for determining whether the Housh article constituted protected speech under the Act. Its utilization by the CIR was therefore contrary to law.

(iii) Appellants' Proposed Speech Standard

[6] In their second assignment of error, the appellants argue that this is actually a First Amendment free speech case and that the proper standard is the balancing test espoused by the U.S. Supreme Court in *Pickering v. Board of Education*.[32] As the basis for this argument, the appellants contend that both the U.S. Constitution and the Nebraska Constitution already provide protection to public employees for engaging in work-related

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[27] *Id.* at 973.

[28] *Crain v. Board of Police Com'rs, supra* note 25.

[29] *Id.* at 1408.

[30] *Hughes v. Whitmer, supra* note 25.

[31] *Id.* at 1419 (quoting *Gasparinetti v. Kerr*, 568 F.2d 311 (3d Cir. 1977)).

[32] *Pickering v. Board of Education*, 391 U.S. 563, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968).

speech. Under the appellants' theory, the Union members would be required to assert their First Amendment rights by means of claims against the appellants pursuant to 42 U.S.C. § 1983 (2000). But, the CIR has no authority to vindicate constitutional rights.[33] Therefore, the CIR would have no jurisdiction to hear a case of this nature.

[7] While we agree with the appellants that public employees do have First Amendment speech rights, we are not persuaded that the *Pickering* balancing test is the appropriate method to determine whether union speech is protected under the Act. The CIR is not a court and is in fact an administrative body performing a legislative function.[34] It has only those powers delineated by statute, and should exercise that jurisdiction in as narrow a manner as may be necessary.[35] Allowing the CIR to decide cases based on constitutional jurisprudence would blur the jurisdictional boundaries between that administrative body and the courts of law. Therefore, we reject the appellants' overture to apply the *Pickering* balancing test to prohibited practice cases under the Act.

(iv) Federal Employee Speech Standard

Although by its terms, the NLRA does not apply to public sector employment,[36] federal employees are afforded labor protections under the Federal Service Labor-Management Relations Act.[37] In 5 U.S.C. § 7116(a) of those statutes, it provides that "it shall be an unfair labor practice for an agency . . . (1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right" under these statutes. Likewise, 5 U.S.C. § 7102 states:

> Each employee shall have the right to form, join, or assist any labor organization . . . freely and without fear of penalty or reprisal, and each employee shall be protected

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[33] *Nebraska Pub. Emp. v. Otoe Cty.*, 257 Neb. 50, 595 N.W.2d 237 (1999).

[34] *Calabro v. City of Omaha*, 247 Neb. 955, 531 N.W.2d 541 (1995).

[35] *Crete Ed. Assn. v. Saline Cty. Sch. Dist. No. 76-0002, supra* note 6.

[36] See 29 U.S.C. § 152(2).

[37] 5 U.S.C. § 7101 et seq. (2000 & Supp. IV 2004).

> in the exercise of such right. Except as otherwise provided under this chapter, such right includes the right—
>
> (1) to act for a labor organization in the capacity of a representative and the right, in that capacity, to present the views of the labor organization to heads of agencies and other officials of the executive branch of the Government, the Congress, or other appropriate authorities, and
>
> (2) to engage in collective bargaining with respect to conditions of employment through representatives chosen by employees under this chapter.

While these statutes are not identical to the comparable provisions of the Act in Nebraska, the language is substantively similar. Because of this similarity to the federal act, we find it helpful to consider Federal Labor Relations Authority (FLRA) cases interpreting § 7102.

In *U.S. Dept. of Veterans Affairs Med. Ctr. Jamaica Plain, Mass.*,[38] a police officer was suspended for insubordination for making threatening remarks in a letter to the chief of police. The FLRA noted that under § 7102, employees had the right to present labor organization views to management. It further recognized that "employee action to publicize labor disputes or issues that have a direct bearing on conditions of employment is protected activity" and that such protection "extends to the publicizing of such disputes or issues through the media."[39] However, it acknowledged that "an agency has the right to discipline an employee who is engaged in otherwise protected activities for actions that 'exceed the boundaries of protected activity such as flagrant misconduct.'"[40] Such flagrant misconduct includes remarks or actions that are of an "'outrageous and insubordinate nature'" and which "compromise an agency's ability to accomplish its mission, disrupt discipline or are disloyal."[41]

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[38] *U.S. Dept. of Veterans Affairs Med. Ctr. Jamaica Plain, Mass.*, 50 F.L.R.A. 583 (1995).

[39] *Id.* at 586.

[40] *Id.*

[41] *Id.*

In *Department of the Air Force Grissom Air Force Base, Ind.*,[42] an employee, who was also a union representative, was suspended for directing offensive language at the employer's representative during collective bargaining negotiations. The FLRA recognized that employee conduct may "'"exceed the boundaries of protected activity such as flagrant misconduct."'"[43] In determining whether an employee has engaged in flagrant misconduct, the FLRA

> balances the employee's right to engage in protected activity, which "permits leeway for impulsive behavior, . . . against the employer's right to maintain order and respect for its supervisory staff on the jobsite." . . . Relevant factors in striking this balance include: (1) the place and subject matter of the discussion; (2) whether the employee's outburst was impulsive or designed; (3) whether the outburst was in any way provoked by the employer's conduct; and (4) the nature of the intemperate language and conduct.[44]

In *Department of the Navy Naval Facilities Eng. Command W. Div. San Bruno, Cal.*,[45] an employee, also a union steward, was reprimanded for using derogatory and insulting language about other personnel in a letter sent to other union employees. The FLRA found many of the employee's remarks to be offensive and did not condone them. However, it recognized that the employee's comments in the letter were protected unless they constituted "'flagrant misconduct.'"[46]

In *American Fed. of Govt. Employees Nat. Border Patrol Council*,[47] a border patrol agent, also a union representative, was suspended for disrespectful conduct toward his supervisor. The

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[42] *Department of the Air Force Grissom Air Force Base, Ind.*, 51 F.L.R.A. 7 (1995).

[43] *Id.* at 11.

[44] *Id.* at 11-12.

[45] *Department of the Navy Naval Facilities Eng. Command W. Div. San Bruno, Cal.*, 45 F.L.R.A. 138 (1992).

[46] *Id.* at 156.

[47] *American Fed. of Govt. Employees Nat. Border Patrol Council*, 44 F.L.R.A. 1395 (1992).

FLRA found that at the time of the comments, the agent was functioning as a representative of the union. Thus, his comments were protected activity under § 7102 unless they constituted "flagrant misconduct."

[8,9] We conclude that a similar legal standard should apply to the determination of whether speech is protected under the Act. Under this new standard, public employees belonging to a labor organization have the protected right to engage in conduct and make remarks, including publishing statements through the media, concerning wages, hours, or terms and conditions of employment. However, employees lose the statutory protection of the Act if the conduct or speech constitutes "flagrant misconduct." Flagrant misconduct includes, but is not limited to, statements or actions that (1) are of an outrageous and insubordinate nature, (2) compromise the public employer's ability to accomplish its mission, or (3) disrupt discipline. It would also include conduct that is clearly outside the bounds of any protection, including, for example, assault and battery[48] or racial discrimination.[49] Importantly, the CIR must balance the employee's right to engage in protected activity, which permits some leeway for impulsive behavior, against the employer's right to maintain order and respect for its supervisory staff. Factors that the CIR may consider, but would not necessarily be determinative, include: (1) the place and subject matter of the conduct or speech, (2) whether the employee's conduct or speech was impulsive or designed, (3) whether the conduct or speech was provoked by the employer's conduct, and (4) the nature of the intemperate language or conduct.

(v) Conclusion

Because we have prescribed a new standard for determining when union speech is protected under the Act, we deem it appropriate that the CIR should apply the standard in the first instance to the facts pertaining to the Housh article. Accordingly,

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[48] See *Department of the Air Force v. F.L.R.A.*, 294 F.3d 192 (D.C. Cir. 2002).

[49] See *Veterans Admin., Washington D.C.*, 26 F.L.R.A. 114 (1987).

we reverse, and remand to the CIR with directions to make that determination.

2. Union's Cross-Appeal

(a) Andersen's Prohibited Practice Claim

The Union argues that the CIR erred in finding that the IA investigation of Andersen did not constitute a prohibited labor practice. In its order, the CIR found that the evidence did not show that the IA investigation of Andersen was "improperly conceived" or "improperly performed" or that the procedure of conducting IA investigations instead of some lesser means of investigation had been overused or otherwise used abusively. The CIR concluded that "[a] pattern or practice of using an internal affairs investigation based upon 'anonymous' phone calls could well establish interference, restraint or corrosion in the exercise of the right to participate in union activities, but the evidence here does not establish such a pattern or practice."

In an appeal from a CIR order regarding prohibited practices under § 48-824, the Nebraska Supreme Court will affirm a factual finding of the CIR if, considering the whole record, a trier of fact could reasonably conclude that the finding is supported by a preponderance of the competent evidence.[50] Based on our reading of the record, we conclude that the CIR's finding is supported by a preponderance of the evidence. Thus, the Union's argument has no merit.

(b) Housh's Remedy

[10] Next, the Union argues that the CIR erred in failing to provide a remedy to Housh after finding the appellants had engaged in a prohibited labor practice. Because we have reversed the CIR's finding that a prohibited practice occurred with respect to Housh, we need not reach this issue. However, an appellate court may, at its discretion, discuss issues unnecessary to the disposition of an appeal where those issues are likely to recur during further proceedings.[51] Expressing no

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[50] See *Crete Ed. Assn. v. Saline Cty. Sch. Dist. No. 76-0002, supra* note 6.

[51] *Perry Lumber Co. v. Durable Servs.*, 271 Neb. 303, 710 N.W.2d 854 (2006); *In re Estate of Rosso*, 270 Neb. 323, 701 N.W.2d 355 (2005).

opinion as to whether the CIR will determine on remand that a prohibited practice occurred, we briefly address the question of Housh's remedy.

When the CIR finds that a party has violated the Act, §§ 48-819.01 and 48-825(2) grant the CIR authority to issue such orders as it may find necessary to provide adequate remedies to the parties to effectuate the public policy enunciated in § 48-802.[52] The record fully supports the finding by the CIR that Housh is not a party to this action and has entered into a separate settlement agreement regarding his personal claims against the appellants. We conclude that the CIR did not err in determining that Housh was not entitled to personal relief in this proceeding based upon any prohibited practice claim asserted by the Union.

(c) Attorney Fees

Finally, the Union argues that the CIR erred in not awarding reasonable attorney fees. Although unnecessary to our disposition of this appeal, we exercise our discretion to reach this issue because of the possibility that it will recur on remand.[53]

Rules of the Nebraska Commission of Industrial Relations 42 (rev. 2005) states: "Attorney's fees may be awarded as an appropriate remedy when the Commission finds a pattern of repetitive, egregious, or willful prohibited conduct by the opposing party." In this case, the CIR found that "the evidence does not establish a willful pattern or practice of violation of the [Union's] freedom in conducting union activities, and it does not establish that the investigations were undertaken in bad faith. Therefore, payment of attorney fees will not be ordered."

Applying the aforementioned standard of review to the whole record,[54] we conclude that the CIR's finding is supported by a preponderance of the competent evidence. Therefore, this argument has no merit.

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[52] *Operating Engrs. Local 571 v. City of Plattsmouth*, 265 Neb. 817, 660 N.W.2d 480 (2003).

[53] See, *Perry Lumber Co. v. Durable Servs., supra* note 51; *In re Estate of Rosso, supra* note 51.

[54] See *Crete Ed. Assn. v. Saline Cty. Sch. Dist. No. 76-0002, supra* note 6.

V. CONCLUSION

For the reasons discussed, we affirm the order of the CIR on all issues presented in this appeal, except its determination that the appellants committed a prohibited practice with respect to Housh. We reverse and vacate that determination because it was based on an incorrect legal standard and therefore contrary to law. We remand the cause to the CIR with directions to apply the legal standard set forth in this opinion to that claim on the existing record.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

HEAVICAN, C.J., not participating.

IN RE ESTATE OF KLAUS DUECK, DECEASED. PAUL D. GARNETT, PERSONAL REPRESENTATIVE OF THE ESTATE OF KLAUS DUECK, DECEASED, APPELLEE, V. GENETIC IMPROVEMENT SERVICES OF NORTH CAROLINA, INC., APPELLANT.

736 N.W.2d 720

Filed August 3, 2007. No. S-06-538.

1. **Decedents' Estates: Appeal and Error.** Appeals of matters arising under the Nebraska Probate Code, Neb. Rev. Stat. §§ 30-2201 through 30-2902 (Reissue 1995 & Cum. Supp. 2004), are reviewed for error on the record.
2. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Decedents' Estates: Appeal and Error.** The probate court's factual findings have the effect of a verdict and will not be set aside unless clearly erroneous.
4. **Judgments: Appeal and Error.** An appellate court, in reviewing a judgment for errors appearing on the record, will not substitute its factual findings for those of the trial court when competent evidence supports those findings.
5. **Reformation: Fraud.** A court may reform an agreement when there has been either a mutual mistake or a unilateral mistake caused by fraud or inequitable conduct on the part of the party against whom reformation is sought.
6. **Contracts.** In order to reform a written agreement to correct a mutual mistake, some form of an agreement in writing must have existed.

Appeal from the County Court for Gage County: STEVEN BRUCE TIMM, Judge. Affirmed.

Andrew M. Loudon, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellant.

Adam J. Prochaska, of Harding, Shultz & Downs, for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MILLER-LERMAN, J.

NATURE OF CASE

The county court for Gage County denied the petition for allowance of claim filed by the appellant, Genetic Improvement Services of North Carolina, Inc. (GIS), against the estate of Klaus Dueck. At issue in this case is whether Dueck, when he was a member of Forward Trend, LLC, personally guaranteed amounts owed by Forward Trend to GIS.

Following trial, the county court found that Dueck neither signed a written guaranty nor orally agreed to guarantee Forward Trend's debt to GIS. In view of these findings, the county court rejected the arguments advanced by GIS that the purported written guaranty by Dueck be reformed or, in the alternative, that the purported oral guaranty by Dueck be deemed enforceable under the "leading object rule," which is an exception to the writing requirement found in the statute of frauds, Neb. Rev. Stat. § 36-202(2) (Reissue 2004). The county court denied GIS' claim. GIS appeals. We determine that the county court did not err in denying the claim. We affirm.

STATEMENT OF FACTS

In approximately June 2002, Forward Trend contracted with GIS to repopulate Forward Trend's swine operation in accordance with a purchase and security agreement. Although the record does not contain a signed copy of this agreement, the parties do not dispute that Forward Trend entered into this agreement with GIS. An additional agreement, entitled "Addendum to Purchase and Security Agreement," composed of two parts, "Payment" and "Unconditional Personal Guaranty," is at issue in this case.

Under the purchase and security agreement, GIS agreed to provide certain replacement gilts. The addendum set forth the terms of a financing plan between the parties. Under the financing plan, Forward Trend would pay 50 percent of the invoice upon delivery, with the balance of the invoice, plus interest, due 6 months from the date of delivery. On June 26, 2002, Dueck signed the "Payment" portion of the addendum on behalf of Forward Trend. The guaranty portion of the addendum was signed by a representative of GIS.

At trial and on appeal, GIS asserts that prior to June 26, 2002, Forward Trend had discussed with Dueck his providing a personal guaranty for Forward Trend's financed debt. GIS further asserts that approximately 2 weeks after June 26, it discovered that its representative had signed the guaranty. GIS claims that it sent a new guaranty agreement to Dueck and that Dueck signed the guaranty. A witness for GIS testified that the new, executed guaranty agreement was then misplaced and has never been found. The record on appeal does not contain a copy of this guaranty agreement allegedly signed by Dueck.

Dueck died on July 18, 2004. At the time of Dueck's death, Forward Trend owed GIS certain sums under the financing plan. On October 12, GIS filed a claim with Dueck's estate for the unpaid portion of the financed debt. On December 3, the personal representative denied the claim. GIS then filed a petition for allowance with the county court.

On March 2, 2006, a trial was held on GIS' claim. Several witnesses testified, and a total of 25 exhibits were received into evidence. During the trial and again before us on appeal, GIS argues that the guaranty portion of the addendum was inadvertently signed by the GIS representative on June 26, 2002, and should be reformed to reflect a guaranty by Dueck. In the alternative, GIS argues in effect that Dueck had orally agreed to guarantee Forward Trend's debt and that the claimed oral agreement should be deemed enforceable under the "leading object rule," which is an exception to the writing requirement found in the statute of frauds, § 36-202(2).

On April 12, 2006, the county court entered an order denying GIS' claim. GIS appeals.

ASSIGNMENTS OF ERROR

On appeal, GIS assigns two errors. GIS claims, restated, that the county court erred (1) when it refused to reform the June 26, 2002, personal guaranty portion of the written addendum to reflect a guaranty by Dueck and (2) when it concluded that the leading object rule, an exception to the statute of frauds concerning oral agreements, did not apply.

STANDARDS OF REVIEW

[1-4] Appeals of matters arising under the Nebraska Probate Code, Neb. Rev. Stat. §§ 30-2201 through 30-2902 (Reissue 1995 & Cum. Supp. 2006), are reviewed for error on the record. *In re Estate of Lamplaugh*, 270 Neb. 941, 708 N.W.2d 645 (2006). When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *In re Trust of Rosenberg*, 273 Neb. 59, 727 N.W.2d 430 (2007). The probate court's factual findings have the effect of a verdict and will not be set aside unless clearly erroneous. *In re Estate of Lamplaugh, supra*. An appellate court, in reviewing a judgment for errors appearing on the record, will not substitute its factual findings for those of the trial court when competent evidence supports those findings. See *in re Trust of Rosenberg, supra*.

ANALYSIS

Given our standard of review, the county court's factual findings are central to our analysis on appeal. As we read the county court's order, the court found, first, that Dueck did not execute the June 26, 2002, guaranty agreement, and second, that Dueck did not orally agree to guarantee Forward Trend's debt to GIS. Thus, the county court effectively found that there was no agreement between GIS and Dueck pursuant to which Dueck guaranteed Forward Trend's debt to GIS, and as a result, the county court denied GIS' claim against Dueck's estate. We have reviewed the record on appeal for clear error and find none. Accordingly, we find no merit to the arguments of GIS and determine that the county court did not err in denying GIS' claim.

Written Addendum: Reformation Is Not an Available Remedy.

[5] For its first assignment of error, GIS claims that the county court erred in refusing to exercise its equitable powers to reform the June 26, 2002, personal guaranty portion of the addendum to reflect Dueck's signature rather than the signature of the GIS representative. A court may reform an agreement when there has been either a mutual mistake or a unilateral mistake caused by fraud or inequitable conduct on the part of the party against whom reformation is sought. *Par 3, Inc. v. Livingston*, 268 Neb. 636, 686 N.W.2d 369 (2004). GIS argues in effect that the GIS representative mistakenly thought that Dueck's June 26 signature on the "Payment" portion of the addendum, which Dueck signed as a representative of Forward Trend, also served as Dueck's personal guaranty on the "Unconditional Personal Guaranty" portion of the addendum and that the representative was merely signing as a witness to Dueck's signature. GIS refers the court to testimony to the effect that Dueck later signed the personal guaranty portion of the addendum, although the latter document could not be produced for trial.

[6] It is axiomatic that in order to reform a written agreement to correct a mutual mistake, some form of an agreement in writing must have existed. See, *Mandell v. Hamman Oil and Refining Co.*, 822 S.W.2d 153, 161 (Tex. App. 1991) (stating that court was "hard pressed to determine how a nonexistent contract could be reformed"); *McClellan v. Boehmer*, 700 S.W.2d 687, 694 (Tex. App. 1985) (stating that "[e]quity may reform the instrument to reflect [the true] agreement [between the parties] but cannot create and bring into being an agreement not made by the parties"), *disapproved on other grounds, Williams v. Glash*, 789 S.W.2d 261 (Tex. 1990); *Wolfe v. Kalmus*, 186 W. Va. 622, 625, 413 S.E.2d 679, 682 (1991) (stating that "it is an exercise in futility to attempt to discuss reformation . . . of a nonexistent contract").

In its order of April 12, 2006, the county court stated the evidence presented by GIS "consist[ed] of an improbable series of events" and found that there was no written guaranty agreement between the parties. In the absence of a written agreement

between GIS and Dueck, there was nothing to reform. See, *Mandell v. Hamman Oil and Refining Co., supra*; *McClellan v. Boehmer, supra*; *Wolfe v. Kalmus, supra*.

When reviewing a judgment for errors appearing on the record, the inquiry by an appellate court is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. See *In re Trust of Rosenberg*, 273 Neb. 59, 727 N.W.2d 430 (2007). The probate court's factual findings have the effect of a verdict and will not be set aside unless clearly erroneous. *In re Estate of Lamplaugh*, 270 Neb. 941, 708 N.W.2d 645 (2006). We have reviewed the record in the instant case, and the record supports the county court's decision. Given this record, we determine that the county court did not err in refusing to reform the June 26, 2002, written addendum to create a personal guaranty by Dueck.

Oral Agreement: Leading Object Rule Is Inapplicable.

For its second assignment of error, GIS generally claims that the county court erred when it concluded that the leading object rule, an exception to the statute of frauds, did not apply. GIS specifically claims that Dueck orally agreed to guarantee Forward Trend's debt and that because Dueck was a member of Forward Trend, he personally benefited from the financing arrangement between Forward Trend and GIS. GIS continues that Dueck's purported oral promise to guarantee Forward Trend's debt to GIS was enforceable under the leading object rule, which is an exception to the writing requirement of the statute of frauds. We determine there is no merit to GIS' second assignment of error.

Nebraska's statute of frauds provides in pertinent part as follows: "In the following cases every agreement shall be void, unless such agreement, or some note or memorandum thereof, be in writing, and subscribed by the party to be charged therewith . . . (2) every special promise to answer for the debt, default, or misdoings of another person." § 36-202(2). Under the leading object rule, when

> the principal object of a party promising to pay the debt of another is to promote his own interests, and not to become a guarantor or surety, and the promise is made on sufficient

> consideration, it will be valid although not in writing. . . . The consideration to support an oral promise to pay the debt of another must operate to the advantage of the promisor . . . and place him under a pecuniary obligation to the promisee . . independent of the original debt . . . which obligation is to be discharged by the payment of that debt.

Heese Produce Co. v. Lueders, 233 Neb. 12, 19-20, 443 N.W.2d 278, 283 (1989) (citations omitted). See, also, *VSC, Inc. v. Lilja*, 203 Neb. 844, 845, 280 N.W.2d 901, 903 (1979) (stating that when "'the leading object of a party promising to pay the debt of another is to promote his own interests, and not to become guarantor, and the promise is made on sufficient consideration, it will be valid although not in writing. In such case the promissor assumes the payment of the debt'") (quoting *Fitzgerald v. Morrissey*, 14 Neb. 198, 15 N.W. 233 (1883)).

The leading object rule presumes that there has been an oral promise or some sort of an oral agreement. See *id*. See, also, 9 Samuel Williston, A Treatise on the Law of Contracts § 22:20 at 302 (Richard A. Lord ed., 4th ed. 1999) (stating that leading object exception applies to an oral promise when "[t]he purpose or object of the promisor is . . . to acquire the consideration for which the promise is exchanged; that is why he gives his promise . . . and if he wants the consideration enough, he will give the kind of promise for it that the promisee desires").

In the instant case, the county court found that Dueck did not orally agree to guarantee Forward Trend's debt to GIS, and it follows that the leading object rule was inapplicable. We have reviewed the evidence and conclude that the county court's decision is supported by the record. Thus, the county court did not err in concluding that the leading object rule, an exception to the statute of frauds, did not apply.

CONCLUSION

The record supports the county court's finding that there was no written or oral guaranty agreement between Dueck and GIS. Therefore the county court did not err in denying GIS' claim against Dueck's estate. The decision of the county court is affirmed.

AFFIRMED.

IN RE APPLICATIONS OF LOREN W. KOCH.
LOREN W. KOCH AND DEPARTMENT OF NATURAL RESOURCES, APPELLEES, V. RONALD E. AUPPERLE AND MARY ANN AUPPERLE, APPELLANTS.

736 N.W.2d 716

Filed August 3, 2007. No. S-06-736.

1. **Moot Question: Words and Phrases.** A case becomes moot when the issues initially presented in the litigation cease to exist, when the litigants lack a legally cognizable interest in the outcome of litigation, or when the litigants seek to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive.
2. **Courts: Judgments.** In the absence of an actual case or controversy requiring judicial resolution, it is not the function of the courts to render a judgment that is merely advisory.
3. **Courts: Justiciable Issues.** A court decides real controversies and determines rights actually controverted, and does not address or dispose of abstract questions or issues that might arise in a hypothetical or fictitious situation or setting.
4. **Moot Question: Appeal and Error.** An appellate court may choose to review an otherwise moot case under the public interest exception if it involves a matter affecting the public interest or when other rights or liabilities may be affected by its determination. This exception requires a consideration of the public or private nature of the question presented, the desirability of an authoritative adjudication for future guidance of public officials, and the likelihood of future recurrence of the same or a similar problem.

Appeal from the Department of Natural Resources. Appeal dismissed.

Donald G. Blankenau, Kevin Griess, and, on brief, Jaron J. Bromm, of Blackwell, Sanders, Peper & Martin, L.L.P., for appellants.

Stephen D. Mossman, of Mattson, Ricketts, Davies, Stewart & Calkins, for appellee Loren W. Koch.

Jon Bruning, Attorney General, and Justin D. Lavene for appellee Department of Natural Resources.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

PER CURIAM.

Ronald E. Aupperle and Mary Ann Aupperle appeal from an order of the director of the Department of Natural Resources

(DNR) determining that they lacked standing to object to two applications filed by Loren W. Koch. One application sought approval of Koch's plans to construct a dam on an unnamed tributary that runs through properties owned by Koch and the Aupperles, and the other sought a permit to impound 50.5 acre-feet of water from the tributary via the dam. We conclude that the appeal is moot.

BACKGROUND

The Aupperles and Koch own adjoining real property in Cass County, Nebraska. An unnamed tributary of Weeping Water Creek runs through the Aupperles' land in a northerly direction and enters onto land owned by Koch. The Aupperles are thus upstream users of the tributary, and Koch is a downstream user.

In 1989, Koch constructed a dam on the tributary and impounded approximately 50.5 acre-feet of water. The dam was constructed without obtaining the required dam safety and storage permits from the DNR. In 2005, the Aupperles, in cooperation with the Lower Platte South Natural Resources District (LPSNRD), commenced construction of a small, low-hazard dam to also impound water from the tributary. Because of its size, the dam was exempt from the DNR permitting requirements.[1]

In June 2005, Koch filed an action in the district court for Cass County seeking to enjoin the Aupperles from constructing their dam, which at the time was approximately 80-percent complete. The district court subsequently enjoined the Aupperles from constructing the dam unless it contained a drawdown or similar device that would allow water to flow through to Koch's property. The Aupperles appealed, and we reversed the judgment of the district court in an opinion filed today.[2]

On September 7, 2005, Koch filed two applications with the DNR. Application No. A-18333 sought a permit to allow

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[1] See Neb. Rev. Stat. §§ 46-1601 to 46-1670 and 46-241(2) (Cum. Supp. 2006).

[2] See *Koch v. Aupperle, ante* p. 52, 737 N.W.2d 869 (2007).

the impoundment of 50.5 acre-feet of water for livestock purposes. Application No. P-16637 sought approval of the design and construction of his existing dam. The Aupperles and LPSNRD both filed written objections to the applications. Koch moved to strike the objections, and the director ruled in Koch's favor, finding that the Aupperles and LPSNRD lacked standing to object. In its order, the DNR noted that the processing of the applications would continue because "[s]talling the Application[s] simply defeats the intent of the Safety of Dams and Reservoirs Act." The DNR concluded: "As no objections remain on the record, the Applications will be processed with information from the Applications and the [DNR's] investigation, without hearing."

The Aupperles filed this timely appeal, which we moved to our docket pursuant to our statutory authority to regulate the caseloads of the appellate courts of this state.[3] LPSNRD is not a party to the appeal. The DNR is a named party but did not file a brief after its motion for summary dismissal was overruled without prejudice.

On the day of oral argument in this court, Koch filed a motion to dismiss the appeal, accompanied by a copy of an order entered by the DNR on the previous day which approved both of Koch's applications. Oral argument proceeded as scheduled, but we granted both parties leave to submit additional briefs on the issue of mootness. In their mootness brief, the Aupperles concede that the DNR has granted Koch's applications. They argue, however, that the appeal is not moot and that even if it is, it should nevertheless be decided on the merits under the public interest exception to the mootness doctrine.

ANALYSIS

Is Appeal Moot?

[1] A case becomes moot when the issues initially presented in the litigation cease to exist, when the litigants lack a legally cognizable interest in the outcome of litigation, or when the litigants seek to determine a question which does not rest upon

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[3] See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

existing facts or rights, in which the issues presented are no longer alive.[4] The issue originally presented in this appeal was whether the Aupperles had standing to object to Koch's permit applications based upon their status as upstream landowners and the provisions of § 46-241(2), under which an on-channel reservoir with a water storage impounding capacity of less than 15-acre feet is exempted from DNR permit requirements. We conclude that this case is moot. Our resolution of the standing issue would have no impact on the DNR's consideration of Koch's applications, as that administrative proceeding has been concluded.

[2,3] The Aupperles argue that "[t]he question on appeal ultimately concerns the extent of DNR's regulatory authority over the owners of certain small ponds."[5] But the DNR has not sought in this action to exercise any regulatory authority over the Aupperles. Thus, any determination of the respective water rights of the Aupperles and Koch would constitute nothing more than an advisory opinion, as there is no case and controversy regarding such rights. In the absence of an actual case or controversy requiring judicial resolution, it is not the function of the courts to render a judgment that is merely advisory.[6] A court decides real controversies and determines rights actually controverted, and does not address or dispose of abstract questions or issues that might arise in a hypothetical or fictitious situation or setting.[7]

Does Public Interest Exception Apply?

[4] The Aupperles argue that if we determine the appeal is moot, we should nevertheless decide the issues presented under the public interest exception to the mootness doctrine.

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[4] *Swoboda v. Volkman Plumbing*, 269 Neb. 20, 690 N.W.2d 166 (2004); *In re Application No. C-1889*, 264 Neb. 167, 647 N.W.2d 45 (2002).

[5] Brief for appellant in opposition to motion for summary dismissal at 4.

[6] *Wilcox v. City of McCook*, 262 Neb. 696, 634 N.W.2d 486 (2001); *Keller v. Tavarone*, 262 Neb. 2, 628 N.W.2d 222 (2001).

[7] *Wood v. Wood*, 266 Neb. 580, 667 N.W.2d 235 (2003); *In re Estate of Reading*, 261 Neb. 897, 626 N.W.2d 595 (2001).

An appellate court may choose to review an otherwise moot case under the public interest exception if it involves a matter affecting the public interest or when other rights or liabilities may be affected by its determination.[8] This exception requires a consideration of the public or private nature of the question presented, the desirability of an authoritative adjudication for future guidance of public officials, and the likelihood of future recurrence of the same or a similar problem.[9]

At its core, this is a dispute between two private landowners regarding potential future rights to store water flowing in a watercourse which transverses their properties. The facts which would frame the resolution of this dispute have not yet occurred. Because we find the necessary considerations to be lacking, we decline to reach the merits of this moot appeal under the public interest exception.

CONCLUSION

For the reasons discussed, we conclude that the issue presented in this appeal is moot, and we decline to reach it under the public interest exception to the mootness doctrine. Accordingly, we dismiss the appeal.

APPEAL DISMISSED.

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[8] *Davis v. Settle*, 266 Neb. 232, 665 N.W.2d 6 (2003); *Chambers v. Lautenbaugh*, 263 Neb. 920, 644 N.W.2d 540 (2002).

[9] *Id.*

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. JOHN P. HEITZ, RESPONDENT.

739 N.W.2d 161

Filed August 3, 2007. No. S-07-512.

Original action. Judgment of disbarment.

WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

PER CURIAM.

INTRODUCTION

This case is before the court on the voluntary surrender of license filed by respondent, John P. Heitz. The court accepts respondent's surrender of his license and enters an order of disbarment.

FACTS

Respondent was admitted to the practice of law in the State of Nebraska on June 24, 1975. At all times relevant hereto, respondent was engaged in the private practice of law in Nebraska.

On May 10, 2007, an application for the temporary suspension of respondent from the practice of law was filed by the chairperson of the Committee on Inquiry of the Third Disciplinary District. The application stated, in effect, that respondent had been appointed to serve as the personal representative in a probate estate case and that in that capacity, respondent had converted in excess of $50,000 of estate funds for his personal use. The application further stated in effect that respondent "has engaged in and continues to engage in conduct that, if allowed to continue until final disposition of disciplinary proceedings, will cause serious damage to the public and to the members of the Nebraska State Bar Association." On May 17, this court issued an order to show cause why respondent should not be temporarily suspended. On May 25, respondent filed his consent to suspension, and on June 6, this court entered an order suspending respondent from the practice of law. Respondent was ordered to comply with the terms of Neb. Ct. R. of Discipline 16 (rev. 2004). The court file in this case reflects that respondent has returned his bar card.

On June 26, 2007, respondent filed with this court a voluntary surrender of license, voluntarily surrendering his license to practice law in the State of Nebraska. In his voluntary surrender of license, respondent stated that, for the purpose of his voluntary surrender of license, he knowingly does not challenge or contest the truth of the allegations in the application for temporary suspension to the effect that while he was serving as the personal representative of a probate estate, he converted

estate funds for his personal use. In addition to surrendering his license, respondent voluntarily consented to the entry of an order of disbarment and waived his right to notice, appearance, and hearing prior to the entry of the order of disbarment.

ANALYSIS

Neb. Ct. R. of Discipline 15 (rev. 2001) provides in pertinent part:

> (A) Once a Grievance, a Complaint, or a Formal Charge has been filed, suggested, or indicated against a member, the member may voluntarily surrender his or her license.
>
> (1) The voluntary surrender of license shall state in writing that the member knowingly admits or knowingly does not challenge or contest the truth of the suggested or indicated Grievance, Complaint, or Formal Charge and waives all proceedings against him or her in connection therewith.

Pursuant to rule 15, we find that respondent has voluntarily surrendered his license to practice law and that, for the purpose of this voluntary surrender of license, respondent knowingly does not contest the truth of the allegations made against him in the application for temporary suspension. Further, respondent has waived all proceedings against him in connection with his voluntary surrender. We further find that respondent has consented to the entry of an order of disbarment.

CONCLUSION

Upon due consideration of the court file in this matter, the court finds that, for the purpose of this voluntary surrender of license, respondent voluntarily has stated that he knowingly does not challenge or contest the truth of the allegations in the application for temporary suspension to the effect that while he was serving as the personal representative of a probate estate, he converted estate funds for his personal use. The court accepts respondent's surrender of his license to practice law, finds that respondent should be disbarred, and hereby orders him disbarred from the practice of law in the State of Nebraska, effective immediately. Respondent shall forthwith fully comply with all terms of disciplinary rule 16, and upon failure to do so,

he shall be subject to punishment for contempt of this court. Accordingly, respondent is directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 1997) and Neb. Ct. R. of Discipline 10(P) (rev. 2005) and 23 (rev. 2001) within 60 days after an order imposing costs and expenses, if any, is entered by the court.

JUDGMENT OF DISBARMENT.

HEAVICAN, C.J., not participating.

HYANNIS EDUCATION ASSOCIATION, AN UNINCORPORATED ASSOCIATION, APPELLEE, V. GRANT COUNTY SCHOOL DISTRICT NO. 38-0011, ALSO KNOWN AS HYANNIS HIGH SCHOOL, A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLANT.

736 N.W.2d 726

Filed August 10, 2007. No. S-06-300.

1. **Commission of Industrial Relations: Appeal and Error.** Any order or decision of the Commission of Industrial Relations may be modified, reversed, or set aside by the appellate court on one or more of the following grounds and no other: (1) if the commission acts without or in excess of its powers, (2) if the order was procured by fraud or is contrary to law, (3) if the facts found by the commission do not support the order, and (4) if the order is not supported by a preponderance of the competent evidence on the record considered as a whole.
2. **Schools and School Districts: Contracts: Wages: Words and Phrases.** "Deviation" in a school wage case is defined as the ability to depart from the salary schedule included in the parties' contract.

Appeal from the Commission of Industrial Relations. Reversed and remanded with directions.

Rex R. Schultze, of Perry, Guthery, Haase & Gessford, P.C., L.L.O., for appellant.

Mark D. McGuire, of McGuire & Norby, for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

HEAVICAN, C.J.

INTRODUCTION

This industrial dispute between the Hyannis Education Association (Association) and Grant County School District No. 38-0011 (District) is before us for the second time. The issue presented by this appeal is whether the Commission of Industrial Relations (CIR) erred when it eliminated a deviation clause from the parties' agreement.

BACKGROUND

THIS COURT'S DECISION IN *HYANNIS I*

The Association and the District were unable to reach a negotiated agreement for the 2002-03 contract year. As a result, the Association filed a petition with the CIR. This court set forth all the relevant facts in its decision in *Hyannis Ed. Assn. v. Grant Cty. Sch. Dist. No. 38-0011* (*Hyannis I*),[1] and such facts will be repeated here only as necessary.

In its order in *Hyannis I*, the CIR accepted the Association's array of comparable districts and determined that the salary schedule from the parties' 2001-02 contract should be utilized in setting the District's base salary and salary schedule for the 2002-03 contract year. The CIR also concluded that issues relating to fringe benefits were moot and, further, that it could not consider whether it was proper to include a deviation clause in the agreement unless it was presented with an array of deviation clauses identical in their terms. Both the Association and the District appealed.

While this court affirmed the order of the CIR in most respects,[2] we reversed the order with respect to the CIR's authority regarding the inclusion of a deviation clause. We concluded that

> [a] valid prevalence analysis does not require as a prerequisite a complete identity of provisions in the array. Rather, prevalence involves a general practice, occurrence, or acceptance, as determined by the CIR. We conclude

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[1] *Hyannis Ed. Assn. v. Grant Cty. Sch. Dist. No. 38-0011*, 269 Neb. 956, 698 N.W.2d 45 (2005).

[2] *Id.*

that the portion of the CIR's order stating that it could not consider the parties' dispute over the inclusion of the deviation clause is contrary to law. Accordingly, given the facts, we reverse that portion of the CIR's order declining to consider the deviation issue and remand the cause to the CIR for consideration of the deviation issue under a prevalence analysis.[3]

CIR Proceedings Following Remand

Upon remand, the issue presented to the CIR was whether the deviation clause in question was prevalent. The language of that clause reads as follows: "The Board reserves the right to deviate from the agreement if it becomes necessary to hire teachers for a particular position." This same language had been included as a negotiated term in the parties' 2001-02 agreement.

The District contended that because four of the seven schools in its array allowed deviation from the salary schedule, albeit under varying circumstances, deviation was prevalent. In essence, the District suggested that deviation be defined broadly. The Association, however, argued that deviation should be defined more narrowly to reflect the distinction between the open-ended deviation proposed by the District and defined deviation. Because open-ended deviation clauses were not prevalent in the array selected by the CIR, the Association asserted that the District's proposed clause should not be included in the parties' contract.

The CIR found for the Association. In so finding, the CIR defined deviation to include only those clauses that "permit[ed] a departure from the bargained for and agreed upon contract, upon defined criteria and/or specific standards, that have been bargained for and agreed upon by the parties." In conducting its prevalency analysis, the CIR was presented with the following deviation language as quoted from the other schools' contracts in the District's array.

Burwell:

In the event that a new teacher cannot be hired on the basis of the adopted schedule and it is necessary to raise

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[3] *Id.* at 968-69, 698 N.W.2d at 56.

> the base, all the teachers in the system shall be placed on the new schedule and salaries adjusted accordingly. If a position has not been filled by August 1, however, the Board reserves the right to exceed the schedule for the new teacher only if it is necessary to do so to fill the position.
>
> **Garden County**:
>
> The salary schedule shall not be construed as being contractual and no teacher employed by the district shall have claims, demands, or course of action of [sic] reason of the provisions. Furthermore, the Board reserves the right to make necessary adjustments in order to meet emergencies which may arise.
>
> **Gordon**: No deviation language in contract.
>
> **Rock County**:
>
> New Graduates may be placed on Step Two if the number of applicants is one.
>
> **Rushville**: No deviation language in contract.
>
> **Thedford**:
>
> Although the Board of Education will endeavor to abide by the Salary Schedule in every instance in employing and reemploying teachers, it does reserve the right to depart from the schedule when it deems the best interest of the school may be served by doing so.
>
> **West Holt**:
>
> The district retains the authority to provide extra compensation for special assigned work and requested services.

The CIR found that only Rock County met its definition of deviation in the context of a school wage case. As only one of the seven schools in the District's array allowed deviation which met the CIR's definition, the CIR concluded that deviation was not prevalent.

The CIR also noted that the District's proposed deviation clause was not "sufficiently similar" to the deviation clauses included in the negotiated agreements of the other schools in the array. As such, the CIR ordered the deviation clause eliminated from the 2002-03 contract.

The District now appeals the CIR's determination.

ASSIGNMENT OF ERROR

The District assigned seven assignments of error, which can be restated as one: The CIR erred in finding that the deviation clause in question was not prevalent and eliminating it from the parties' 2002-03 agreement.

STANDARD OF REVIEW

[1] In our review of orders and decisions of the CIR involving an industrial dispute over wages and conditions of employment, our standard of review is as follows: Any order or decision of the CIR may be modified, reversed, or set aside by the appellate court on one or more of the following grounds and no other: (1) if the CIR acts without or in excess of its powers, (2) if the order was procured by fraud or is contrary to law, (3) if the facts found by the CIR do not support the order, and (4) if the order is not supported by a preponderance of the competent evidence on the record considered as a whole.[4]

ANALYSIS

In *Hyannis I*, we remanded this cause to the CIR "for consideration of the deviation issue under a prevalence analysis."[5] In doing so, we held that contract terms relating to deviation need not be identical in order to be prevalent, and noted that in the context of a prevalent wage rate, "when the members of the array to which comparison is made 'are sufficiently similar and have enough like characteristics or qualities[, then] comparison [is] appropriate.'"[6]

We conclude that under the circumstances presented, the CIR erred in concluding that deviation was not prevalent. The record presented to this court contains the deviation clauses in the negotiated agreements of the other schools in the District's array. Although these clauses vary in their construction, each has a common thread: Each district with such a clause has the ability to depart, or deviate from, the salary schedule included in the negotiated agreement.

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[4] *Hyannis I, supra* note 1.

[5] *Id.* at 969, 698 N.W.2d at 56.

[6] *Id.* at 967, 698 N.W.2d at 55.

[2] This commonality is consistent with the generally understood definition of "deviation." Webster's dictionary defines deviation as the "departure from an established body of principles, a system of beliefs, an ideology, or a party line,"[7] while Black's dictionary defines deviation as "a change from a customary or agreed-on course of action."[8] We conclude that "deviation" in a school wage case is the ability to depart from the salary schedule included in the parties' contract.

This definition is also consistent with our statement in *Hyannis I* that contract terms need not be identical to be considered in a prevalency analysis, but instead need only be "'sufficiently similar and have enough like characteristics or qualities.'"[9] In comparing the deviation language of the other schools to the language proposed by the District, the CIR found that none of the clauses presented were sufficiently similar. In doing so, the CIR rejected the basic similarity of all of the clauses, that each allowed a departure from the salary schedule.

Given our conclusion that the CIR did not apply the correct definition of deviation to the record in this case, it would ordinarily be necessary for the CIR to make further factual findings regarding the prevalency of deviation clauses in the array. However, such action is not necessary here. As outlined below, certain factual findings in the CIR's order allow this court to apply the correct definition of deviation to the record in order to make a determination regarding prevalency.

In table 1 of its order, the CIR noted a distinction between "'Deviation' clauses with defined terms" and those "without defined terms." Implicitly, then, the CIR acknowledged that both clauses dealt with deviation in its general sense. We conclude that the schools categorized by the CIR as having either type of deviation clause should be considered in a prevalency analysis. On the record before us, four of the schools in the District's array—Burwell, Garden County, Rock County, and Thedford—allow deviation from the salary schedule. And yet

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[7] Webster's Third New International Dictionary, Unabridged 618 (1993).

[8] Black's Law Dictionary 482 (8th ed. 2004).

[9] *Hyannis I, supra* note 1, 269 Neb. at 967, 698 N.W.2d at 55.

another district, West Holt, has language in its agreement that could arguably be considered deviation language.

In *Hyannis I*, we reaffirmed that "[t]he standard inherent in the word 'prevalent' is one of general practice, occurrence, or acceptance . . . ."[10] Where at least four of the seven schools in the District's array have negotiated agreements which contain deviation clauses, such a practice is prevalent. Because such practice is prevalent, the deviation clause should be included in the parties' contract for 2002-03. The CIR's order to eliminate the clause was contrary to law and was not supported by a preponderance of the competent evidence on the record considered as a whole. We therefore reverse the CIR's order eliminating the clause, and remand this cause to the CIR with instructions to include the clause in the parties' 2002-03 contract.

The District makes several additional arguments, all relating to the assertion that the CIR erred in concluding that deviation was not prevalent. Because we agree with the District that the CIR erred in eliminating the provision, we need not consider the District's remaining arguments.

MOOTNESS

We note that the Association contends this appeal is moot as a result of the enactment of 2005 Neb. Laws, L.B. 126. The Association argues that due to L.B. 126, both the District and the Association ceased to exist as legal entities. Although the Association acknowledges that legal entities bearing the same names exist, it contends that those entities are not the same legal entities which were the original parties to this industrial dispute.

We disagree with the Association. We have reviewed the record, including those public records of which the parties stipulated we could take judicial notice, and conclude that this appeal is not moot.

CONCLUSION

We conclude the CIR erred in finding that deviation was not prevalent among the schools in the District's array. As such, the

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[10] *Hyannis I, supra* note 1, 269 Neb. at 968, 698 N.W.2d at 55.

CIR erred in eliminating the proposed deviation clause from the parties' 2002-03 contract.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA EX REL. L. TIM WAGNER, DIRECTOR OF INSURANCE OF THE STATE OF NEBRASKA, APPELLEE, V. AMWEST SURETY INSURANCE COMPANY, APPELLEE, AND STRATEGIC CAPITAL RESOURCES, INC., CLAIMANT, APPELLANT.

738 N.W.2d 805

Filed August 17, 2007. No. S-05-1267.

1. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusions reached by the trial court.
2. **Insurance: Equity: Appeal and Error.** An insurer liquidation proceeding lies in equity, and an appellate court reviews a liquidation court's determination of claims disputes de novo on the record.
3. **Contracts: Guaranty.** Nebraska adheres to the rule of strict construction of guaranty contracts.
4. ____: ____. A guaranty is interpreted using the same general rules as are used for other contracts.
5. **Guaranty: Liability.** When the meaning of the contract is ascertained, or its terms are clearly defined, the liability of the guarantor is controlled absolutely by such meaning and limited to the precise terms.
6. **Principal and Surety.** A surety cannot be held beyond the precise terms of its contract. Any intention on the part of the surety to assume a further and continued liability must be found in the words of the contract made.
7. **Contracts: Guaranty: Liability.** When a guaranty contract contains express conditions, those conditions must be strictly complied with before the guarantor is liable.
8. **Contracts: Guaranty.** Where a guarantor attaches a certain condition or conditions to the agreement, such condition or conditions must be construed in favor of the guarantor, and the failure of a creditor to strictly comply with any condition or conditions invalidates the guaranty.
9. **Contracts: Guaranty: Notice.** Where a contract of guaranty specifically requires notice of default, the failure to give such notice discharges the guarantor's obligations.

Appeal from the District Court for Lancaster County: JOHN A. COLBORN, Judge. Affirmed.

Steven N. Lippman, of Rothstein, Rosenfeldt & Adler, and Sean M. Reagan, of Reagan Law Offices, P.C., L.L.O., for appellant.

John H. Binning, Robert L. Nefsky, and Jane F. Langan, of Rembolt Ludtke, L.L.P., for appellee L. Tim Wagner.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MILLER-LERMAN, JJ.

GERRARD, J.

Saxton, Inc., entered into four lease agreements with Strategic Capital Resources, Inc. (Strategic), then contracted with Amwest Surety Insurance Company (Amwest) to issue four corresponding lease bonds under which Amwest agreed to provide payment to Strategic in the event that Saxton defaulted. Amwest became subject to an order of liquidation, pursuant to which Amwest's lease bonds were canceled and a statutory liquidator was appointed to manage claims made against Amwest.

Following the termination of the lease bonds, Strategic provided Amwest with written notice of Saxton's default. The liquidator denied all of Strategic's claims. Strategic appealed. Because Strategic failed to comply with the express provisions of the lease bonds before the lease bonds were canceled, we affirm the denial of Strategic's claims.

STATEMENT OF FACTS

In 1999, Saxton entered into four lease agreements with Strategic. As security for Saxton's performance under the lease agreements, Saxton contracted with Amwest to issue lease bonds. Pursuant to each lease bond, Amwest agreed to provide payment to Strategic, up to a predetermined amount, in the event that Saxton committed a default under the lease. Amwest issued four lease bonds, each bond corresponding to one of the four leases.

Three of the four lease bonds contained the following provision:

> This bond is executed by the Principal [Saxton] and Surety [Amwest] and accepted by the Obligee [Strategic] upon the following express conditions:

> . . . .
>
> 2. In the event of any default of the Principal herein, the Surety shall be given written notice by the Obligee of such default within thirty (30) days after such default by certified mail to the Surety . . . .

The other lease bond provided:

> A default shall be deemed to have occurred on the part of the Principal [Saxton] if the Principal shall fail to perform fully its obligations under the lease agreement within the time set forth therein. Obligee [Strategic] has given Principal written notice of such default, and Principal has failed to cure such default within the time period required by the lease agreement.

On June 7, 2001, Amwest became the subject of an "Order of Liquidation, Declaration of Insolvency, and Injunction" entered by the district court for Lancaster County. Pursuant to the liquidation order, L. Tim Wagner, Director of Insurance for the State of Nebraska, was appointed as statutory liquidator (Liquidator). The Liquidator appointed Horizon Business Resources, Inc. (Horizon), as the authorized claims/litigation management, construction consulting, and subrogation agent. As the authorized claims agent, Horizon was responsible for investigating claims made on Amwest and evaluating their validity and value. The order of liquidation also provided that all of Amwest's bond obligations were to be canceled 30 days from the date of entry of the order. Thus, the cancellation date for the lease bonds at issue in this case was July 6, 2001.

On June 8, 2001, a document entitled "Notice of Legal Rights and Obligations" was sent to all bond obligees. This document, among other things, informed the bond obligees that an order to liquidate Amwest had been entered in the district court and listed the name and responsibilities of the Liquidator. This document also stated the relevant cancellation dates of Amwest's bond obligations.

On July 9, 2001, Strategic sent Amwest four letters, each letter referencing one of the four lease bonds. The letters stated that "Saxton, Inc. has failed to perform its obligations under the Lease Agreement and therefore is in default." The letters demanded full payment under each of the corresponding lease

bonds. The only evidence presented in the record that provides any detail with regard to Saxton's alleged default is in the affidavit of David Miller, Strategic's chairman. In his affidavit, Miller testified that Saxton failed to make lease payments on December 1, 2000, and thereafter.

Horizon apparently treated Strategic's notice of default letters as an attempt to serve a claim on Amwest because, on July 30, 2001, Horizon sent Strategic four letters acknowledging receipt of each of Strategic's "notice of claim[s]." Enclosed with the letters were proof of claim forms. Horizon's letters explained that Strategic was to file the proof of claim forms, and supporting documentation, no later than June 7, 2002.

On August 1, 2001, Amwest sent four letters to Strategic, each letter corresponding to one of the four lease bonds. The letter stated that the Liquidator would implement a claims process and that Strategic would be sent a new proof of claim form within 90 days, which form Strategic would also need to complete and file by June 7, 2002. The letter explained that Horizon "will continue to act as the authorized claims adjusting company on all Amwest claims" and that a "Horizon claims representative will continue to investigate your claim."

Miller testified in his affidavit that following receipt of these letters, Strategic contacted Horizon at the telephone number listed on each of Amwest's August 1, 2001, letters, and was told that it could not file a claim until it received the appropriate forms. Miller further testified that sometime between June 7 and June 19, 2002, Strategic received and completed the approved proof of claim forms. The proof of claim forms were filed on June 20, 2002, 13 days after the June 7 bar date. On September 5, Amwest sent Strategic four letters acknowledging the receipt of Strategic's proof of claim forms and informing Strategic that because the proof of claim forms were postmarked after the bar date, the claims would be treated as late-filed claims.

Liquidator's Decision

On October 31, 2003, the Liquidator denied all Strategic's claims. The Liquidator explained that

> [b]y operation of law, all bonds issued by Amwest . . . were cancelled 30 days after the Order of Liquidation.

> Therefore, all bonds were cancelled on July 6, 2001. Notice of default on [these] bond[s] was issued on July 9, 2001, after cancellation of the bond[s]. Therefore, there is no coverage for [these] claim[s].

Strategic filed an objection to the Liquidator's decision. The Liquidator reviewed Strategic's objection and chose not to alter his initial determination.

Referee's Decision

Pursuant to Neb. Rev. Stat. § 44-4839(2) (Reissue 2004), whenever objections are filed with a liquidator and the liquidator does not alter his or her denial of the claim, the disputed claim may be referred to a court-appointed referee who submits findings of fact and his or her recommendation. In the present case, the disputed claims were referred to the court-appointed referee. The district court approved and adopted "procedures" to be used to govern the referee's participation in the administration of the claims against Amwest in accordance with § 44-4839(2).

Because all four of Strategic's claims involved similar facts, the referee consolidated the claims and issued a single report in which he recommended that all of the claims be denied. In denying the claims, the referee stated that pursuant to Neb. Rev. Stat. § 44-4835(2) (Reissue 2004), "the inclusion of late filed claims in the claims adjudication process is wholly within the discretion of the Liquidator; the Liquidator has exercised his discretion to accept [Strategic's] claims as Class 6 (Late Filed Claims). The [District] Court should not review this action of the Liquidator." The referee continued, explaining:

> The . . . Liquidator's determination that no amount should be allowed for [Strategic's] claims is supported by the Hearing Record. The Notices of Default are without any specificity. If Saxton was in default of its performance obligations under the Lease Agreements, the Lease Agreements required notice to Saxton and an opportunity to cure the default. The nature of Saxton's claimed defaults is not identified. It is reasonable to conclude that upon learning of Amwest's liquidation, [Strategic] sought a complete forfeiture of the Lease Bonds. The obligations [sic] of Amwest was to assure Saxton's performance; there is

> nothing in the Hearing Record to support a conclusion that Saxton failed to perform any of its lease obligations while the Bonds were in-force.

Strategic disagreed with the referee's report and filed its objections to the referee's findings in the district court.

DISTRICT COURT'S DECISION

The district court found that all of the claims were properly denied. The court stated that "the Referee's determination [was] supported by competent, material and substantive evidence appearing in the record and was made in accordance with the Procedures."

The court further explained that "the in-force obligations of Amwest were cancelled no later than July 6 2001" but that Strategic sent its written notices on July 9, 2001. The court stated that "the claim file contains no evidence that the that [sic] Saxton failed to perform any of its lease obligations while the bonds were in force." Finally, the court noted that "the record makes clear that the Claimant's claim was received after the Claims bar date of June 7, 2002." And "even if any amount was allowed, the Claim was properly characterized as a Class 6 (late filed) claim." Strategic appeals.

ASSIGNMENTS OF ERROR

On appeal, Strategic assigns, restated and renumbered, that the district court erred in (1) denying its objection to the referee's report and (2) concluding that Strategic's claims were not timely filed.

STANDARD OF REVIEW

[1] When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusions reached by the trial court.[1]

[2] An insurer liquidation proceeding lies in equity, and an appellate court reviews a liquidation court's determination of claims disputes de novo on the record.[2]

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[1] *Didier v. Ash Grove Cement Co.*, 272 Neb. 28, 718 N.W.2d 484 (2006).

[2] *State ex rel. Wagner v. Amwest Surety Ins. Co., post* p. 121, 738 N.W.2d 813 (2007).

ANALYSIS

Strategic's Failure to Provide Notice

Strategic's arguments on appeal are primarily concerned with the conclusion that its claims were late filed. We do not reach those issues, however, because of a more fundamental problem with Strategic's claims. On our de novo review of the record, we agree with Amwest's argument that Strategic's claims were correctly denied because Strategic failed to comply with the express conditions set forth in each of the lease bonds before the lease bonds were canceled.

[3-6] Nebraska adheres to the rule of strict construction of guaranty contracts.[3] A guaranty is interpreted using the same general rules as are used for other contracts.[4] When the meaning of the contract is ascertained, or its terms are clearly defined, the liability of the guarantor is controlled absolutely by such meaning and limited to the precise terms.[5] We have further explained that

> "[A] surety cannot be held beyond the precise terms of his contract. Any intention on the part of the surety to assume a further and continued liability must be found in the words of the contract made. It is not a matter of inference, but of express statement. The liability of a surety, therefore, is measured by, and will not be extended beyond, the strict terms of his contract."[6]

In short, Amwest's obligations as a surety are strictly governed by the express terms of the lease bonds. Accordingly, for Amwest to be liable under the terms of the lease bonds, Strategic must comply with all of the necessary preconditions for payment.

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[3] *Federal Deposit Ins. Corp. v. Heyne*, 227 Neb. 291, 417 N.W.2d 162 (1987).

[4] *Spittler v. Nicola*, 239 Neb. 972, 479 N.W.2d 803 (1992).

[5] *Federal Deposit Ins. Corp., supra* note 3.

[6] *Farmers Union Co-op Assn. v. Mid-States Constr. Co.*, 212 Neb. 147, 153, 322 N.W.2d 373, 377 (1982).

We addressed a similar issue in *Dockendorf v. Orner*.[7] In *Dockendorf*, the United States Fidelity and Guaranty Company (U.S.F.&G.), as surety, and Donald Moran, as principal, entered into a surety agreement. For approximately 10 months, Moran and his agents purchased cattle from Dale Dockendorf. Approximately 6 months after the final purchase, Dockendorf sued Moran, his agents, and U.S.F.&G., alleging that Moran had defaulted on payments owed and that U.S.F.&G., as surety, was liable for the principal's default up to the maximum amount under the bond.

Moran's surety bond provided in relevant part that "'[a]ny claim for recovery on this bond must be filed in writing with either the Surety, or the Trustee . . . . All claims must be filed within 120 days of the date of the transaction on which claim is made.'"[8] The surety bond further provided that the surety "'shall not be liable to pay any claim for recovery on this bond if it is not filed in writing within 120 days from the date of the transaction on which the claim is based . . . .'"[9] The bond also required that a lawsuit based on the claim be filed no less than 180 days or more than 18 months after the transaction.[10] Dockendorf had not filed a claim within 120 days, and thus, Dockendorf's claim was denied.[11]

In denying the claim, we explained that the bond contained two conditions: The first condition required a timely filing of a claim in writing, and the second condition related to the time-frame within which litigation must be commenced.[12] We concluded that "[i]t is clear that in the present case [Dockendorf] failed to file a claim in writing within 120 days of the date of the transaction on which claim is made. Since [Dockendorf] failed to satisfy the first condition, recovery under the bond will

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[7] *Dockendorf v. Orner*, 206 Neb. 456, 293 N.W.2d 395 (1980).

[8] *Id.* at 459, 293 N.W.2d at 397.

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Dockendorf, supra* note 7.

not be allowed."[13] In other words, because the conditions to payment had not been satisfied, the surety's obligation to pay did not arise.

[7] Courts in other jurisdictions have similarly concluded that when a guaranty contract contains express conditions, those conditions must be strictly complied with before the guarantor is liable.[14] Since the foundation of the creditor's rights is the guarantor's contract, it follows that his rights are restricted by the terms of the contract and any conditions, express or implied, affecting them.[15] The guarantor may limit his liability by whatever conditions he may see fit to impose, and failure to comply with them will preclude recourse to him.[16]

[8,9] Where a guarantor attaches a certain condition or conditions to the agreement, such condition or conditions must be construed in favor of the guarantor, and the failure of a creditor to strictly comply with any condition or conditions invalidates the guaranty.[17] A stipulation for notice of default is a condition of liability which may always be imposed.[18] Where a contract of guaranty specifically requires notice of default, the failure to give such notice discharges the guarantor's obligations.[19]

In the present case, each of the four lease bonds contained explicit conditions that must be complied with before Amwest's liability under the agreements would arise. As set forth more fully above, three of the four lease bonds required Strategic to provide Amwest written notice of Saxton's default as a condition precedent to Strategic's right to payment under the lease bonds. The undisputed facts, however, reveal that Amwest did

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[13] *Id.* at 461, 293 N.W.2d at 398.

[14] See, e.g., *Lee v. Vaughn*, 259 Ark. 424, 534 S.W.2d 221 (1976); *Yama v. Sigman*, 114 Colo. 323, 165 P.2d 191 (1945); *Electric Storage Battery Co. v. Black*, 27 Wis. 2d 366, 134 N.W.2d 481 (1965).

[15] *Barati v. M.S.I. Corp. et al.*, 212 Pa. Super. 536, 243 A.2d 170 (1968).

[16] *Lee, supra* note 14.

[17] *Id.*

[18] *Id.*; *Barati, supra* note 15.

[19] *Lee, supra* note 14.

not receive notice of Saxton's default until after the lease bonds were canceled.

The first time Amwest received notice of any alleged default by Saxton was on July 9, 2001. That was the earliest possible date Amwest's liability could have arisen. However, pursuant to the liquidation order, the lease bonds had been terminated 3 days earlier. Amwest's obligation to pay did not arise before the lease bonds had been terminated. Strategic's claims for payment under these three lease bonds were correctly denied.

Strategic also failed to comply with the express terms of the remaining lease bond. Amwest's obligation to pay, pursuant to that bond, did not arise until Strategic had given Saxton written notice of its default and an opportunity to cure the default. But our de novo review of the record reveals no evidence to show that Strategic complied with these conditions by sending written notice of the alleged default to Saxton or any evidence that Saxton was ever given an opportunity to cure the alleged default. Strategic has failed to prove that it was entitled to any payment from Amwest under the remaining lease bond.

Strategic claims that notwithstanding the fact that the lease bonds have now been terminated, the alleged defaults took place before the lease bonds were canceled and that therefore, Amwest remains obligated to pay. In support of this argument, Strategic relies on cases dealing with occurrence-based insurance policies. Strategic contends that under occurrence policies, if the event insured against—i.e., the occurrence—takes place within the policy period, regardless of when a claim is made, the policy provides coverage.

However, Strategic's reliance on cases relating to occurrence policies is misplaced. The contracts at issue in this case are guaranty contracts, not insurance liability policies. As a guaranty contract, the liability of the guarantor is limited to the precise terms used in the contract.[20] Before Amwest's liability under the lease bonds arose, certain conditions had to be satisfied. Strategic did not comply with those provisions while the lease bonds were in force.

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[20] See *Federal Deposit Ins. Corp., supra* note 3.

Strategic also argues that while the lease bonds do require written notice of default to Amwest, this has never been asserted as a basis for denying Strategic's claims and, therefore, cannot be a basis now. Strategic's argument is without merit. In denying Strategic's claims, the Liquidator explained that

> [b]y operation of law, all bonds issued by Amwest . . . were cancelled 30 days after the Order of Liquidation. Therefore, all bonds were cancelled on July 6, 2001. Notice of default on [these] bond[s] was issued on July 9, 2001, after cancellation of the bond[s]. Therefore, there is no coverage for [these] claim[s].

Strategic's failure to satisfy the conditions of the lease bonds was clearly relied upon by the Liquidator, and Strategic has failed to demonstrate error on this basis for denying its claims.

In sum, on our de novo review, we conclude that Strategic has failed to comply with the express conditions found in each of the four lease bonds while the lease bonds were in effect. Accordingly, the Liquidator, the referee, and the district court correctly concluded that Strategic was not entitled to payment under any of the lease bonds. Having determined that Strategic's claims were properly denied for failure to comply with the express conditions of the lease bonds, we need not address Strategic's remaining assignments of error.

CONCLUSION

The referee and the district court correctly denied Strategic's claims because Strategic failed to satisfy the conditions set forth in the lease bonds before the lease bonds were canceled. The judgment of the district court is affirmed.

AFFIRMED.

McCORMACK, J., not participating.

STATE OF NEBRASKA EX REL. L. TIM WAGNER, DIRECTOR OF INSURANCE OF THE STATE OF NEBRASKA, APPELLEE, V. AMWEST SURETY INSURANCE COMPANY, APPELLEE, AND SUNHOUSE INTERNATIONAL, INC., CLAIMANT, APPELLANT.

738 N.W.2d 813

Filed August 17, 2007. No. S-06-049.

1. **Equity: Appeal and Error.** Although in many contexts the traditional distinctions between law and equity have been abolished, whether an action is one in equity or one at law controls in determining an appellate court's scope of review.
2. **Actions: Pleadings.** Whether a particular action is one at law or in equity is determined by the essential character of a cause of action and the remedy or relief it seeks.
3. **Claims: Judgments: Appeal and Error.** The liquidation court's determinations of claims disputes are reviewed de novo on the record.
4. **Claims: Notice.** In a pending liquidation proceeding, when notice is not properly given in accordance with Neb. Rev. Stat. § 44-4822 (Reissue 1998), a claimant should not be penalized for failing to timely file a claim in the liquidation proceeding of which the claimant was unaware.
5. ____: ____. If the liquidator, through the records of the company in liquidation, has the direct address of the persons described in Neb. Rev. Stat. § 44-4822 (Reissue 1998), then it is not an onerous requirement to send notice to that address.
6. **Evidence: Proof.** Even in cases where the party does not have the general burden of proof, the burden to produce evidence will rest upon that party when the party possesses positive and complete knowledge concerning the existence of facts which the party having that burden is called upon to negative, or where for any reason the evidence to prove a fact is chiefly, if not entirely, within the party's control.

Appeal from the District Court for Lancaster County: JOHN A. COLBORN, Judge. Reversed.

Robert F. Craig, P.C., for appellant.

John H. Binning, Robert L. Nefsky, and Jane F. Langan, of Rembolt Ludtke, L.L.P., for appellee L. Tim Wagner.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MCCORMACK, J.

NATURE OF CASE

This is an appeal from an insurer liquidation proceeding under the Nebraska Insurers Supervision, Rehabilitation,

and Liquidation Act (the Act).[1] Sunhouse International, Inc. (Sunhouse), appeals the district court's approval of a downgrade of Sunhouse's claim against Amwest Surety Insurance Company (Amwest) to a class 6 late-filed claim.[2] Sunhouse did not receive actual notice of the liquidation proceedings until after the claim bar date. According to Sunhouse, despite the fact that the liquidator's file clearly contained Sunhouse's corporate address, the liquidator sent notice of the liquidation proceedings only to Sunhouse's former attorneys. Sunhouse asserts that such notice was insufficient under § 44-4822(1)(d) of the Act, which states that the liquidator shall give notice of the liquidation by first-class mail to all "persons known or reasonably expected to have claims against the insurer . . . at their last-known address as indicated by the records of the insurer."

BACKGROUND

Sunhouse's claim against Amwest stems from a 1996 subcontract performance bond and subcontract labor and material bond which Amwest provided for Consolidated Techniques, Inc. (Consolidated), insuring its work relating to the construction of an elementary school in Miami, Florida. Sunhouse was a general contractor for the job and had hired Consolidated to do certain electrical work. Consolidated left the project before completion in August 1997, on the ground that it had not been fully paid. Alleging breach of contract, Sunhouse filed suit against Consolidated in Florida in April 1998. Sunhouse originally lost the suit, but the Florida Court of Appeals reversed the judgment and remanded the cause with directions to enter judgment in favor of Sunhouse and to determine further damages and costs.[3] Judgment in favor of Sunhouse was eventually entered in the amount of $423,471.16.

The Nebraska district court's order to liquidate Amwest was issued on June 7, 2001, during the pendency of the appeal of Sunhouse's Florida suit. A claim bar date for the liquidation

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[1] Neb. Rev. Stat. §§ 44-4801 to 44-4862 (Reissue 1998).

[2] See § 44-4842(6).

[3] See *Sunhouse Const., Inc. v. Amwest Surety Ins.*, 841 So. 2d 496 (Fla. App. 2003).

proceedings was set for June 7, 2002, such that any claim filed after that date would be considered late filed. Affidavits by the vice president of Sunhouse and by Sunhouse's attorney reflect that Sunhouse did not receive actual notice of the liquidation.

As will be set forth in further detail in our analysis, Amwest's records contain Sunhouse's correct corporate address at 363 Granello Avenue, Coral Gables, Florida. Amwest's records also contain the address of attorneys who, according to Sunhouse, no longer represented Sunhouse at the time of the liquidation proceedings. The address for these attorneys was found in correspondence dating from the early years of the Florida litigation.

There is no dispute that Horizon Business Resources (Horizon), on behalf of the liquidator, sent notice to the attorneys shown in Amwest's records. The evidence is in dispute, however, as to whether the liquidator ever sent notice directly to Sunhouse at its Granello Avenue address.

Sometime in the spring of 2003, an attorney who represented Amwest and Consolidated in the Florida litigation advised Sunhouse's attorneys in Florida that Amwest was in liquidation in Nebraska. Soon thereafter, Sunhouse filed a proof of claim against Amwest in the Nebraska liquidation proceedings.

The liquidator informed Sunhouse that the claim would be considered a class 6 late-filed claim because notice had been sent to Sunhouse's attorneys of record. Sunhouse disputed this determination, and in accordance with § 44-4839, the liquidator asked the district court for a hearing on the disputed claim. The district court referred the matter to a court-appointed referee and set forth procedures specifying that the hearing would consist of the submission of the liquidator's claim file and other supportive written evidence, along with legal arguments. The referee concluded, "The Hearing Record supports the finding that timely notices were sent to Sunhouse . . . at its business address shown in the records of Amwest." It is unclear from the report to what "business address" the referee was referring. The referee recommended that the class 6 designation be upheld.

Sunhouse took exception to the referee's report, and a hearing was held before the district court, which received into evidence the claim file and several affidavits that had been considered by the referee. The court stated it would accept and approve the

referee's determination if supported by competent, material, and substantive evidence appearing in the record. The district court ultimately found that timely notices were sent to Sunhouse at the 363 Granello Avenue address. In its conclusion, the district court stated that even if Sunhouse were correct that notice was sent only to the attorneys listed in the Amwest file, such notice was sufficient. The district court approved and adopted the referee's report and upheld the liquidator's class 6 designation of Sunhouse's claim. Sunhouse appeals.

ASSIGNMENT OF ERROR

Sunhouse assigns that the district court erred in approving the liquidator's classification.

STANDARD OF REVIEW

[1] Before addressing the merits of the dispute, we must first determine our standard of review. In this case, whether the liquidation proceedings lie in law or equity is decisive. Although in many contexts the traditional distinctions between law and equity have been abolished, whether an action is one in equity or one at law controls in determining an appellate court's scope of review.[4]

[2,3] Whether a particular action is one at law or in equity is determined by the essential character of a cause of action and the remedy or relief it seeks.[5] We have characterized insurance liquidation proceedings under the prior statutory scheme as judicial in nature and conducted in a court of equity.[6] The equitable character of such proceedings is reflected in the language of the current Act. Its stated purpose is the protection of the interests of the insureds, claimants, creditors, and the public through various means, including "[e]quitable apportionment

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[4] *Dillon Tire, Inc. v. Fifer*, 256 Neb. 147, 589 N.W.2d 137 (1999).

[5] See *id.*

[6] See, *Clark v. Lincoln Liberty Life Ins. Co.*, 139 Neb. 65, 296 N.W. 449 (1941); *State, ex rel. Good, v. National Old Line Life Ins. Co.*, 129 Neb. 473, 261 N.W. 902 (1935); *State v. Farmers & Merchants Ins. Co.*, 90 Neb. 664, 134 N.W. 284 (1912).

of any unavoidable loss."[7] A liquidation plan submitted for court approval "may prefer the claims of certain insureds and claimants over creditors and interested parties as well as other insureds and claimants, as the director finds to be fair and equitable considering the relative circumstances of such insureds and claimants."[8] The Act further provides for "[e]quitable allocation of disbursements to each of the guaranty associations and foreign guaranty associations entitled thereto."[9] There is no provision in the current Act limiting the scope of appellate review of orders entered by the district court. We conclude that this proceeding under the Act is equitable in nature and, therefore, reviewable de novo on the record.[10]

ANALYSIS

Sunhouse's primary contention is that the liquidator failed to comply with the Act's notice provisions. Section 44-4822(1)(d) states that the liquidator shall give or cause to be given notice of the liquidation order as soon as possible "[b]y first-class mail to all persons known or reasonably expected to have claims against the insurer, including all policyholders *at their last-known address as indicated by the records of the insurer.*" (Emphasis supplied.) "If notice is given in accordance with [§ 44-4822(4)], the distribution of assets of the insurer . . . shall be conclusive with respect to all claimants whether or not they receive actual notice."[11]

[4] We agree with Sunhouse that in a pending liquidation proceeding, when notice is not properly given in accordance with § 44-4822, a claimant should not be penalized for failing to timely file a claim in the liquidation proceeding of which the claimant was unaware. Section 44-4822(2) states that "[n]otice to potential claimants under subsection (1) of this section shall require claimants to file with the liquidator their claims together

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[7] § 44-4801(4).

[8] § 44-4818(6)(a).

[9] § 44-4834(c).

[10] See *Dillon Tire, Inc. v. Fifer, supra* note 4.

[11] § 44-4822(4).

with proper proofs thereof under section 44-4836 on or before a date the liquidator shall specify in the notice." Although the Act does not specifically set forth the consequences of a failure to provide notice under § 44-4822, it follows that if statutory notice "shall require claimants to file," then lack of notice does not require such filing. This has been the approach taken by other jurisdictions that have considered the effect of a liquidator's failure to comply with the statutory notice requirements of insurance liquidations.[12]

[5] We also agree that if the liquidator's file reflects the potential claimant's direct address, then mailing a notice to attorneys listed in correspondence between the claimant and the insurance company from several years previous does not satisfy § 44-4822. The statute specifies that notice must be mailed to the last known address of "all persons known or reasonably expected to have claims" and does not provide that notice can be sent to those persons "or their representatives." If the liquidator, through the records of the company in liquidation, has the direct address of the persons described in § 44-4822, then it is not an onerous requirement to send notice to that address.

Thus, we now consider the record to determine whether the liquidator in this case had Sunhouse's corporate address in Amwest's records. The district court stated that "the last known address of Sunhouse as indicated by the records of Amwest was 'c/o Siegfried, Rivera, Lerner, De La Torre & Sobel.'" This is the law firm, located at 201 Alhambra Circle, Suite 110, Coral Gables, Florida, which Sunhouse states no longer represented it at the time of the notices. Our review of the record shows that Amwest's file contains correspondence from 1997 and 1998 showing the address of the Siegfried, Rivera, Lerner, De La Torre, and Sobel law firm. But, in addition, Amwest's records contain numerous letters of correspondence between Sunhouse and Amwest showing Sunhouse's correct corporate address at 363 Granello Avenue. In fact, the file contains several letters

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[12] See, *Matter of Transit Cas. Co.*, 79 N.Y.2d 13, 588 N.E.2d 38, 580 N.Y.S.2d 140 (1992); *Middleton v. Imperial Ins. Co.*, 34 Cal. 3d 134, 666 P.2d 1, 193 Cal. Rptr. 144 (1983); *State v. United Physicians Ins. Risk Ret.*, 958 S.W.2d 348 (Tenn. App. 1997).

sent by Amwest to Sunhouse at the Granello Avenue address. We conclude that Sunhouse's "last-known address as indicated by the records of the insurer" was Sunhouse's corporate address at 363 Granello Avenue.[13] The liquidator had an obligation to send notice to that address.

Whether notice was in fact sent by the liquidator to Sunhouse's corporate address is the main point of contention between the parties. We find it helpful to set forth the relevant evidence on this issue in its entirety and in chronological order.

The record shows that in an internal e-mail of Horizon, dated May 5, 2003, a Consolidated employee advised that Sunhouse was disputing proper notice, but that after reviewing the "master mailing list," it was clear that notice was sent to Sunhouse's previous attorney of record. The employee concluded that Sunhouse's claim should be classified as late, because Horizon "did everything we could under the circumstances." The "master mailing list" does not appear in the record.

On June 20, 2003, a letter was sent from Horizon to Sunhouse's current attorney, in response to Sunhouse's objection to its late-filed classification. Horizon again justified the class 6 designation by explaining that notice was sent to Sunhouse's attorneys of record, stating, "If that firm was no longer representing Sunhouse, and chose not to forward the [proof of claim] to its (prior) client or the new attorney of record, that fact was unknown and uncontrollable by Amwest's Liquidator." That same date, an internal note to Horizon's file states that after "reviewing the complete file, and checking in Amwest . . . records . . . notice of liquidation . . . was timely sent to the principal's counsel on record in our file." Correspondence dated May 17, 2004, again recommends that Sunhouse's claim be considered late filed because notice was sent to Sunhouse's counsel, as reflected by the records of Amwest.

It was not until July 2005 that evidence was presented indicating notice for Sunhouse was sent to anyone other than its previous attorneys of record. That evidence consists entirely of the affidavit of Marnell Land. We quote that affidavit in full:

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[13] See § 44-4822(1)(d).

1. I am an employee of the Special Deputy Liquidator of Amwest Surety Insurance Company ("Amwest"). I have personal knowledge of the matters addressed in this Affidavit. I am a custodian of the records prepared and maintained in the ordinary course of Amwest and Amwest's liquidation from which the information contained in this Affidavit was derived. These records were made at or near the time of the events they record.

2. Part of my duties [is] to investigate the handling of legally required notices and other communications to claimants and other interested parties. I have become familiar with the process that the liquidation has employed in assuring that all Notices of Bond and Policy Cancellation, Notices of Legal Rights (Notices) and Proofs of Claim (POCs) were mailed to the parties, including Amwest policyholders (the "Interested Parties"), who may have an interest in the liquidation of Amwest.

3. I have investigated the POCs and Notices mailed to Interested Parties regarding Bond # 030001648 whose principal is Consolidated Techniques, Inc. and whose obligee is Sunhouse International, Inc. (the "Sunhouse Parties").

4. Between June 21, 2001 and June 28, 2001, a Notice of Cancellation of Bond and Policy Cancellation and a Notice of Legal Rights [were] mailed to the following Sunhouse Parties: Consolidated Techniques, Inc. P.O. Box 823266, South Florida, FL 33082; Sunhouse International, Inc., 363 Granello Avenue, Coral Gables, FL 33146; Collinsworth, Alter, Nielson, Fowler & Dowling, Inc., 5979 NW 151st Street, Suite 105, Miami Lakes, FL 33014. All of said notices were mailed to the last known addresses of the addressees as indicated by the records of Amwest.

5. Between October 19, 2001 and October 23, 2001, POCs were mailed to the following Sunhouse Parties: Consolidated Techniques, Inc. P.O. Box 823266, South Florida, FL 33082; Sunhouse International, Inc., 363 Granello Avenue, Coral Gables, FL 33146; Collinsworth, Alter, Nielson, Fowler & Dowling, Inc. 5979 NW 151st Street, Suite 105, Miami Lakes, FL 33014; Sunhouse Construction, c/o Siegfried Rivera Lerner De La Torre &

> Sobel, 201 Alhambra Circle, Suite 110, Coral Gables, FL 33134. All of said notices were mailed to the last known addresses of the addressees as indicated by the records of Amwest.

No exhibits were attached to the affidavit.

At this juncture, we must consider the burden of proof for a disputed claim in liquidation proceedings. The Act is silent on this question. Sunhouse offered affidavits of its vice president and of an attorney whose firm represented Sunhouse in the Florida litigation from January 2002 to January 2005. Both testified that based on their personal knowledge, notice of Amwest's liquidation was not received either by Sunhouse at its corporate address or through its attorneys during the relevant time period.

[6] Sunhouse could not do more to prove that the liquidator failed to send it notice. We have said that even in cases where the party does not have the general burden of proof, the burden to produce evidence will rest upon that party when the party "possesses positive and complete knowledge concerning the existence of facts which the party having that burden is called upon to negative, or where for any reason the evidence to prove a fact is chiefly, if not entirely, within [the party's] control."[14] We conclude that under the circumstances of this case, the burden fell to the liquidator to prove that the notice requirements of § 44-4822 had been met.

Land's 2005 affidavit was the only evidence presented by the liquidator to suggest that notice was mailed to Sunhouse's corporate address. In contrast, several documents from the liquidator's file from 2003 and 2004 reflect that after Sunhouse complained of not receiving notice, Horizon reviewed "the complete file" and determined that notice was sent to the offices of Siegfried, Rivera, Lerner, De La Torre and Sobel. If there was evidence in Amwest's file that notice had also been sent directly to Sunhouse at its corporate address, it is curious that this was not mentioned at that time.

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[14] *Fitzsimmons v. Gilmore*, 134 Neb. 200, 206, 278 N.W. 262, 265 (1938). See, also, *Central Nat. Bank v. First Nat. Bank*, 115 Neb. 472, 216 N.W. 302 (1927) (applying this principle to bank receiverships).

We are called upon, in our de novo review, to judge the credibility of Land's affidavit. In light of the other evidence presented, we find the affidavit insufficient proof that, in accordance with § 44-4822, notice was sent to Sunhouse's last known address as reflected in Amwest's records. Land asserts that the affidavit is based on personal knowledge, but she does not explain what that knowledge is. Land later states that she is the custodian of the Amwest liquidation records "from which the information contained in this affidavit was derived." If Land's knowledge is based only upon a review of the records, as opposed to having personally witnessed the preparation or mailing of the notices, then the records themselves would be the best evidence of the facts in issue. We have no explanation as to why the relevant portions of the records referred to in the affidavit are not in evidence.

The statement made in Land's affidavit is simply too lacking in specificity and foundation, and was made too late in these proceedings, to contradict Sunhouse's evidence that it did not receive the notice required by law.

CONCLUSION

Because the liquidator failed to sustain its burden to prove the required statutory notice was sent, we reverse the district court's decision to uphold the late-filed classification.

REVERSED.

RICHARD T. BELLINO, ALSO KNOWN AS RICH BELLINO, AND LA VISTA KENO, INC., APPELLANTS AND CROSS-APPELLEES, v. MCGRATH NORTH MULLIN & KRATZ, PC LLO, ET AL., APPELLEES AND CROSS-APPELLANTS.

738 N.W.2d 434

Filed August 17, 2007. No. S-06-130.

1. **Limitations of Actions: Appeal and Error.** The point at which a statute of limitations begins to run must be determined from the facts of each case, and the decision of the district court on the issue of the statute of limitations normally will not be set aside by an appellate court unless clearly wrong.

2. **Directed Verdict: Evidence: Appeal and Error.** Concerning the overruling of a motion for a directed verdict made at the close of all the evidence, appellate review is controlled by the rule that a directed verdict is proper only when reasonable minds can draw but one conclusion from the evidence, where an issue should be decided as a matter of law.
3. **Judgments: Verdicts.** On a motion for judgment notwithstanding the verdict, the moving party is deemed to have admitted as true all the relevant evidence admitted that is favorable to the party against whom the motion is directed, and, further, the party against whom the motion is directed is entitled to the benefit of all proper inferences deducible from the relevant evidence.
4. ____: ____. To sustain a motion for judgment notwithstanding the verdict, the court resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw but one conclusion.
5. **Trial: Expert Witnesses: Appeal and Error.** A trial court's ruling in receiving or excluding an expert's testimony which is otherwise relevant will be reversed only when there has been an abuse of discretion.
6. **Limitations of Actions: Negligence.** A claim for professional negligence accrues and the statute of limitations begins to run at the time of the act or omission which is alleged to be the professional negligence that is the basis for the claim.
7. ____: ____. In order for a continuous relationship to toll the statute of limitations regarding a claim for malpractice, there must be a continuity of the relationship and services for the same or related subject matter after the alleged professional negligence.
8. **Malpractice: Attorney and Client: Negligence: Proof: Proximate Cause: Damages.** In a civil action for legal malpractice, a plaintiff alleging attorney negligence must prove three elements: (1) the attorney's employment, (2) the attorney's neglect of a reasonable duty, and (3) that such negligence resulted in and was the proximate cause of loss (damages) to the client.
9. **Attorney and Client.** The general rule regarding an attorney's duty to his or her client is that the attorney, by accepting employment to give legal advice or to render other legal services, impliedly agrees to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks which they undertake.
10. **Corporations.** A director or other corporate officer cannot acquire an interest adverse to that of the corporation while acting for the corporation or when dealing individually with third persons.
11. ____. An officer or director of a corporation occupies a fiduciary relation toward the corporation and its stockholders and should refrain from all acts inconsistent with his or her corporate duties.
12. **Corporations: Partnerships.** Shareholders in a close corporation owe one another the same fiduciary duty as that owed by one partner to another in a partnership.
13. **Partnerships.** Partners must exercise the utmost good faith in all their dealings with the members of the firm and must always act for the common benefit of all.
14. ____. A partner has a duty to refrain from competing with the partnership in the conduct of the partnership business before the dissolution of the partnership.

15. **Negligence: Proximate Cause: Words and Phrases.** A proximate cause is a cause that produces a result in a natural and continuous sequence and without which the result would not have occurred.
16. **Directed Verdict: Evidence.** A directed verdict is proper at the close of all the evidence only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is to say, when an issue should be decided as a matter of law.
17. **Appeal and Error.** To be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party assigning the error.
18. **Malpractice: Attorney and Client: Damages.** The general measure of damages in a legal malpractice action is the amount of loss actually sustained by the claimant as a proximate result of the attorney's conduct.
19. **Malpractice: Attorney and Client: Negligence: Proof.** In an action for legal malpractice, the plaintiff must establish that but for the alleged negligence of the attorney, the plaintiff would have obtained a more favorable judgment or settlement.

Appeal from the District Court for Douglas County: PATRICIA A. LAMBERTY, Judge. Affirmed in part, and in part reversed and remanded with direction.

David A. Domina and Claudia L. Stringfield-Johnson, of Domina Law Group, P.C., L.L.O., for appellants.

John R. Douglas and David A. Blagg, of Cassem, Tierney, Adams, Gotch & Douglas, for appellees.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MILLER-LERMAN, JJ.

WRIGHT, J.

I. NATURE OF CASE

Richard T. Bellino sought legal advice concerning the severance of his business relationship with Robert L. Anderson and La Vista Lottery, Inc. (Lottery). As a result of Bellino's actions in reliance on such advice, Anderson and Lottery sued and obtained a judgment against Bellino. Based on this judgment, the court awarded monetary damages and a constructive trust in favor of Anderson. Bellino brought the present action for professional negligence against the law firm McGrath North Mullin & Kratz, PC LLO, and two of its attorneys, James D. Wegner and William F. Hargens (collectively McGrath North). The jury returned a $1.6 million verdict in favor of Bellino. The district

court sustained McGrath North's motion for judgment notwithstanding the verdict in part and reduced the award to $229,036.40. Bellino appeals, and McGrath North cross-appeals.

II. SCOPE OF REVIEW

[1] The point at which a statute of limitations begins to run must be determined from the facts of each case, and the decision of the district court on the issue of the statute of limitations normally will not be set aside by an appellate court unless clearly wrong. *Zion Wheel Baptist Church v. Herzog*, 249 Neb. 352, 543 N.W.2d 445 (1996).

[2] Concerning the overruling of a motion for a directed verdict made at the close of all the evidence, appellate review is controlled by the rule that a directed verdict is proper only when reasonable minds can draw but one conclusion from the evidence, where an issue should be decided as a matter of law. *Fales v. Norine*, 263 Neb. 932, 644 N.W.2d 513 (2002).

[3,4] On a motion for judgment notwithstanding the verdict, the moving party is deemed to have admitted as true all the relevant evidence admitted that is favorable to the party against whom the motion is directed, and, further, the party against whom the motion is directed is entitled to the benefit of all proper inferences deducible from the relevant evidence. *Munstermann v. Alegent Health*, 271 Neb. 834, 716 N.W.2d 73 (2006). To sustain a motion for judgment notwithstanding the verdict, the court resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw but one conclusion. *Id.*

[5] A trial court's ruling in receiving or excluding an expert's testimony which is otherwise relevant will be reversed only when there has been an abuse of discretion. *Epp v. Lauby*, 271 Neb. 640, 715 N.W.2d 501 (2006).

III. FACTS

1. Underlying Case

This action for professional negligence arose out of the legal representation given to Bellino with regard to the severing of his business relationship with Anderson and Lottery. Bellino was the president, a director, and a 50-percent shareholder of

Lottery. Bellino's actions in severing this relationship resulted in litigation, the facts of which are reported in *Anderson v. Bellino*, 265 Neb. 577, 658 N.W.2d 645 (2003). Some of those facts are recounted here for the sake of providing helpful background.

In 1989, the city of La Vista sought bids for the operation of a keno-type lottery for the city. Bellino and Anderson submitted a bid for the La Vista keno contract. In April 1989, Bellino and Anderson formed Lottery, a Nebraska corporation, for the purpose of operating the keno parlor. Bellino and Anderson each owned 50 percent of the shares of stock of Lottery, and both were officers and directors of the corporation.

Lottery entered into a keno operation contract with La Vista on May 16, 1989. The fixed term of the contract was extended through July 31, 1998, with a provision that the term would continue indefinitely beyond that term until one party served 60 days' written notice of termination upon the other.

Initially, Bellino and Anderson received salaries from Lottery. In 1993, following the advice of an accountant, they stopped receiving salaries. There was no express agreement between Bellino and Anderson as to the amount of time that each would devote to the lottery business. From 1994 to 1998, Lottery employed general managers, keno managers, supervisors, and keno writers.

In December 1997, Bellino and Anderson discussed the fact that Lottery's keno contract with La Vista was set to expire on July 31, 1998. Bellino told Anderson that he would meet with Anderson after the holidays to discuss Lottery's course of action. Shortly thereafter, in early 1998, Bellino sought legal advice from his attorneys concerning his desire to end the business arrangement with Anderson yet continue the keno operation.

In a letter to Anderson dated February 26, 1998, Bellino stated that he felt he was doing more than his share of the work. Bellino indicated he no longer intended to be associated with Lottery after the corporation's keno contract expired on July 31, 1998. In a letter dated April 21, 1998, Anderson's attorney informed Bellino that the keno contract with the city of La Vista was a corporate opportunity. The letter expressed Lottery's desire to have Bellino cooperate with Lottery in bidding for the new contract.

During the first quarter of 1998, Bellino met with La Vista's city administrator, Cara L. Pavlicek. After her conversation with Bellino, Pavlicek reviewed the contract and recommended to the city council that the keno contract be put up for competitive bid. On April 21, 1998, the La Vista City Council voted to accept Pavlicek's recommendation and put the keno contract up for bids. On May 4, Bellino's attorney wrote to Anderson and Lottery, informing them that Bellino had no interest in trying to resolve matters with Lottery and would not bid for the contract as part of Lottery.

Based on the advice of his attorney, Bellino formed La Vista Keno, Inc. (Keno), of which he was the sole shareholder. Bellino prepared and submitted a bid on behalf of Keno for the keno contract. The city awarded the new keno contract to Keno on July 24.

On July 29, 1998, Anderson and Lottery sued Bellino and Keno, alleging that Bellino had breached a fiduciary duty he owed to Lottery as an officer, director, and shareholder of Lottery by forming Keno and bidding on the La Vista keno contract. Anderson and Lottery sought the imposition of a constructive trust on Keno's business operations for the benefit of Anderson and Lottery.

Following a trial on May 9, 2000, the district court concluded that Bellino and Keno had obtained the contract with La Vista in breach of Bellino's fiduciary duty to Lottery and that the appropriate remedy was the imposition of a constructive trust for the benefit of Anderson and Lottery. The court further ordered Bellino to pay Anderson and Lottery $644,992.63, representing various items, including rents, profits, and benefits resulting from Bellino and Keno's receiving the keno contract from La Vista.

Bellino appealed to this court. On March 28, 2003, we affirmed the district court's order imposing a constructive trust upon Keno for the benefit of Anderson and Lottery, as well as the monetary judgment entered against Bellino.

2. Present Action for Professional Negligence

Bellino was represented in the above-described proceedings by attorneys Wegner and Hargens of McGrath North. Bellino

relied on the attorneys' advice when he formed Keno and submitted a bid for the keno contract with La Vista. These attorneys continued to represent him throughout the resulting litigation with Anderson, including at trial, during initial settlement discussions, and on appeal. The attorneys withdrew from representing Bellino on May 27, 2003. Bellino retained new counsel and ultimately settled his dispute with Anderson for $2,427,729.76. The settlement payment was made to acquire Anderson's share in Keno that Anderson had acquired through the constructive trust.

Bellino and Keno (collectively Bellino) commenced this action for professional negligence against McGrath North, Wegner, and Hargens on December 3, 2003, in the district court for Douglas County. Bellino alleged that McGrath North committed legal malpractice because it failed to fully and fairly advise him that he could be liable for a breach of fiduciary duty by forming Keno and bidding for the La Vista keno contract while still associated with Anderson and Lottery. Bellino alleged that McGrath North failed to advise him that a court could impose a constructive trust in favor of Anderson and Lottery on Keno's profits from the La Vista keno contract. He requested judgment against McGrath North for all damages proximately caused by the attorneys' professional negligence.

After a trial, the jury awarded Bellino $1.6 million in damages. McGrath North moved for judgment notwithstanding the verdict or, in the alternative, for a new trial.

McGrath North asserted 12 grounds for judgment notwithstanding the verdict that the district court restated into four: (1) McGrath North's legal advice to Bellino did not constitute malpractice because the attorneys advised him on an unsettled point of Nebraska law, (2) McGrath North's legal advice was not the proximate cause of any damages, (3) Bellino's claim was barred by the statute of limitations, and (4) the jury verdict of $1.6 million in favor of Bellino was contrary to the law and evidence.

(a) Rejection of Argument Regarding Unsettled Point of Law

McGrath North claimed that Nebraska case law provided an "undefined exception" to the fiduciary duty rule prohibiting

corporate officers and directors from competing against the corporation of which they serve. McGrath North argued that it attempted to qualify Bellino for this exception by advising him to take an "above-board" approach when he incorporated Keno and submitted a bid for the La Vista keno contract in competition with Lottery. It advised Bellino to cooperate with Anderson in submitting a bid on behalf of Lottery even while preparing a bid on behalf of Keno, to continue to allow Lottery to rent space in a building owned by Bellino if Lottery successfully retained the keno contract, and to refrain from submitting a competing bid in the name of Bellino's wife.

McGrath North asserted that even though it was unsuccessful in qualifying Bellino for the "undefined exception" to the fiduciary duty rule, the attorneys had not committed malpractice. The district court found that the evidence, viewed in a light most favorable to Bellino, did not show that the attorneys informed Bellino about any "undefined exception" to the rule prohibiting an officer or director from competing against his current corporation.

(b) Finding of Proximate Cause

McGrath North next argued that its legal advice was not the proximate cause of any damages to Bellino because there was no evidence of any legally permissible alternative that could have been recommended and pursued other than a buyout. McGrath North argued that the trial evidence showed that the only way that Bellino could have terminated his business relationship with Anderson and retained the La Vista keno contract was to buy out Anderson. According to McGrath North, a buyout was not successful because Bellino did not want to pay the amount Anderson had demanded.

During the trial, Jane Friedman, a retired law professor and one of Bellino's experts, testified that McGrath North could have advised Bellino to file an action for judicial dissolution of Lottery as provided by Nebraska law. McGrath North argued that judicial dissolution was not a viable alternative. It claimed there was no evidence of a deadlock between Bellino and Anderson or in the management of the corporate affairs that caused or threatened an irreparable injury to Lottery. Construing

the evidence in favor of Bellino, the district court found that reasonable minds could conclude that there was a basis for judicial dissolution. The evidence showed that Bellino no longer wanted to be in business with Anderson and sought legal advice to terminate their relationship.

(c) Finding That Bellino's Claim Was Timely Filed

Next, McGrath North argued that Bellino's claim was barred as a matter of law by the 2-year limitations period applicable to claims for professional negligence. McGrath North had advised Bellino concerning Keno between February and July 1998. It argued that Bellino's claim was reasonably discoverable on May 9, 2000, when the district court ruled that Bellino had breached his fiduciary duties as a corporate officer of Lottery. McGrath North contended that Bellino should have reasonably discovered that its advice had been negligent when the judgment was entered by the district court and, therefore, that he should have brought his claim no later than May 9, 2001.

The district court rejected this argument and applied the continuous representation rule. Under this rule, the statute of limitations for a claim of professional negligence is tolled if there is a continuity of the relationship and services for the same or related subject matter after the alleged professional negligence. The evidence showed that Bellino relied on McGrath North's advice when he formed a new corporation and bid for the La Vista keno contract. The court found that Bellino continued to rely on McGrath North's legal advice throughout the ensuing litigation with Anderson. Bellino did not terminate the professional relationship with McGrath North until after this court issued its opinion in *Anderson v. Bellino*, 265 Neb. 577, 658 N.W.2d 645 (2003). Construing the evidence and the inferences therefrom in Bellino's favor, the court determined that reasonable minds could conclude that a continuous relationship existed between Bellino and McGrath North from 1998 until May 27, 2003, that prevented him from discovering the legal malpractice until after the relationship was terminated. The court thus concluded that McGrath North was not entitled to judgment notwithstanding the verdict based on the statute of limitations.

(d) Reduction of Damages Award

McGrath North also asserted that the evidence did not support the $1.6 million jury verdict. It claimed that the only damages Bellino sustained as a result of the attorneys' legal advice were the legal and accounting fees incurred while defending the lawsuit filed by Anderson and Lottery.

During the trial, the jury heard testimony from two expert witnesses regarding Bellino's damages. Leo J. Panzer, a certified public accountant, testified that Bellino's damages exceeded $3.1 million. McGrath North presented testimony from another certified public accountant, who said that Bellino did not suffer any damages because he bought out Anderson's interest in Keno, which interest Anderson acquired through the constructive trust. McGrath North argued that Bellino suffered no damages by settling the matter with Anderson because Bellino received a valuable asset in return for the settlement payment.

In sustaining part of McGrath North's motion for judgment notwithstanding the verdict, the court found that McGrath North's negligent advice resulted in the filing of a lawsuit against Bellino for breach of fiduciary duty. Because Bellino was forced to spend a total of $229,036.40 in legal and accounting fees to defend the lawsuit, the court held that McGrath North was liable to Bellino for that amount.

However, the court concluded that the evidence was insufficient to support the remainder of the $1.6 million awarded by the jury. Evidence showed that by settling with Anderson for $2,427,729.76, Bellino had acquired Anderson's constructive interest in the keno operation. To achieve Bellino's goals of terminating the business relationship with Anderson and retaining the La Vista keno contract, the court concluded that Bellino had no other option but to buy out Anderson's share in the keno operation. Stated another way, the court concluded that a buyout was inevitable, even if McGrath North had not advised Bellino in the manner it did. The court thus concluded that the settlement payment was not proximately caused by McGrath North's negligence and modified the judgment to $229,036.40, reflecting only the amount Bellino paid in the Anderson litigation for legal and accounting fees.

IV. ASSIGNMENTS OF ERROR

In his appeal, Bellino claims the trial court erred in partially sustaining McGrath North's motion for judgment notwithstanding the verdict and reducing the award of damages.

McGrath North asserts 11 assignments of error in its cross-appeal, which we summarize in the following manner: The trial court erred (1) in finding that Bellino's action for professional negligence was timely filed under the applicable statute of limitations; (2) in failing to hold as a matter of law that the conduct of McGrath North was not negligent and did not result in loss to Bellino; (3) in allowing Bellino's witnesses to discuss and the jury to decide whether a sufficient basis existed for judicial dissolution of Lottery, because that determination was a question of law for the district court; and (4) in overruling McGrath North's motion for new trial.

V. ANALYSIS

1. McGrath North's Cross-Appeal

(a) Timeliness of Bellino's Claim

McGrath North argues that Bellino's action was barred by the applicable statutes of limitations. The limitations period on a claim for professional negligence is 2 years from the date of the alleged act or omission; however, if the cause of action is not discovered and could not be reasonably discovered within such 2-year period, then the action may be commenced within 1 year from the date of discovery. See Neb. Rev. Stat. § 25-222 (Reissue 1995). The trial court applied the continuous representation rule and found that Bellino timely filed his claim against McGrath North.

McGrath North asserts that Bellino's claim for legal malpractice was reasonably discoverable on May 9, 2000, when the trial court entered judgment in *Anderson v. Bellino*, 265 Neb. 577, 658 N.W.2d 645 (2003), that Bellino had violated his fiduciary duty as a corporate officer of Lottery. McGrath North thus asserts that Bellino should have filed this action no later than May 9, 2001. We disagree.

The point at which a statute of limitations begins to run must be determined from the facts of each case, and the decision of

the district court on the issue of the statute of limitations normally will not be set aside by an appellate court unless clearly wrong. *Zion Wheel Baptist Church v. Herzog*, 249 Neb. 352, 543 N.W.2d 445 (1996).

[6] A claim for professional negligence accrues and the statute of limitations begins to run at the time of the act or omission which is alleged to be the professional negligence that is the basis for the claim. See *Zion Wheel Baptist Church v. Herzog*, *supra*. A statute of limitations may begin to run at some time before the full extent of damages has been sustained. *Id*. Bellino's claim accrued in 1998, when the attorneys advised him to form Keno and bid for the La Vista keno contract.

[7] If a claim for professional negligence is not to be considered time barred, the plaintiff must either file within 2 years of an alleged act or omission or show that its action falls within the exceptions of § 25-222. See *Zion Wheel Baptist Church v. Herzog*, *supra*. Because Bellino did not file a complaint against McGrath North until December 3, 2003, his claim would be barred unless the limitations period was tolled for some reason. In order for a continuous relationship to toll the statute of limitations regarding a claim for malpractice, there must be a continuity of the relationship and services for the same or related subject matter after the alleged professional negligence. *Id*.

The evidence showed that during the time McGrath North represented Bellino, he continued to reasonably rely on the attorneys' legal advice. Bellino relied on the advice of his attorneys in forming Keno and bidding on the La Vista keno contract. He relied on the attorneys' advice when he was sued by Anderson and Lottery and lost at trial. And he continued to rely on the attorneys' advice throughout the appeal process, including the attorneys' suggestion that Bellino would do better on appeal than by accepting a $1.5 million settlement with Anderson. The professional relationship continued until shortly after this court issued its opinion on March 28, 2003, in *Anderson v. Bellino, supra*. Bellino terminated his professional relationship with McGrath North on May 27. He filed a complaint against McGrath North on December 3. We conclude that the continuous representation rule applies and that the trial court did not err in determining that this action was timely filed.

(b) Professional Negligence

On cross-appeal, several of McGrath North's arguments concern the district court's refusal to hold as a matter of law that the law firm's conduct did not constitute professional negligence. Specifically, McGrath North argues that the jury verdict was contrary to the evidence and the law, and it contests the court's overruling of its motions for directed verdict and new trial and overruling in part its motion for judgment notwithstanding the verdict. We address McGrath North's arguments in a general manner by considering whether any evidence supported a finding that McGrath North committed professional negligence while representing Bellino.

(i) Negligent Conduct

In summary, McGrath North argues that it advised Bellino in accordance with Nebraska case law that provides an "undefined exception" to the fiduciary duty rule prohibiting corporate officers and directors from competing against the corporation they serve. The law firm asserts that it did not commit legal malpractice even though it was unsuccessful in qualifying Bellino for this "exception" because it cannot be liable for making an error in judgment over an unsettled point of law.

The district court determined that the evidence in a light most favorable to Bellino established that he was never informed about any exception to the fiduciary duty rule and that when looking at all the evidence in a light most favorable to Bellino, reasonable minds could conclude that McGrath North committed legal malpractice in failing to inform Bellino about an exception to the rule. We conclude that McGrath North's argument concerning the "undefined exception" is without merit.

In *Anderson v. Bellino*, 265 Neb. 577, 658 N.W.2d 645 (2003), we held that Bellino breached a fiduciary duty owed to Anderson and Lottery. The contract to operate keno in La Vista was a corporate opportunity that Bellino, as a director, diverted from Lottery by forming a new corporation to bid against Lottery. See *id*. The issue in the present case is whether McGrath North negligently advised Bellino, which advice resulted in a loss to Bellino.

[8,9] In a civil action for legal malpractice, a plaintiff alleging attorney negligence must prove three elements: (1) the attorney's employment, (2) the attorney's neglect of a reasonable duty, and (3) that such negligence resulted in and was the proximate cause of loss (damages) to the client. *Borley Storage & Transfer Co. v. Whitted*, 271 Neb. 84, 710 N.W.2d 71 (2006). The general rule regarding an attorney's duty to his or her client is that the attorney, by accepting employment to give legal advice or to render other legal services, impliedly agrees to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks which they undertake. *Baker v. Fabian, Thielen & Thielen*, 254 Neb. 697, 578 N.W.2d 446 (1998).

A director or corporate officer cannot acquire an interest adverse to that of the corporation while acting for the corporation or when dealing individually with third persons. *Anderson v. Bellino, supra*; *Anderson v. Clemens Mobile Homes*, 214 Neb. 283, 333 N.W.2d 900 (1983). Our opinion in *Anderson v. Clemens Mobile Homes*, 214 Neb. at 288, 333 N.W.2d at 904, contains dicta stating:

> It has been held that although an officer or a director of a corporation is not necessarily precluded from entering into a separate business because it is in competition with the corporation, his fiduciary relationship to the corporation and its stockholders is such that if he does so he must prove by a preponderance of the evidence that he did so in good faith and did not act in such a manner as to cause or contribute to the injury or damage of the corporation, or deprive it of business; if he fails in this burden of proof, there has been a breach of that fiduciary trust or relationship.

This language does not provide a defense to McGrath North.

Although McGrath North asserts that it relied on this language and in good faith believed that a situation was possible in which an officer or director could compete with the corporation and not breach his or her fiduciary duty, the facts in this case clearly do not support such an argument. McGrath North claims it believed Bellino's best strategy was to be "up front and honest" with Anderson when bidding against Lottery for the La Vista keno

contract and to give Lottery an opportunity to also bid on the contract. See brief for appellees on cross-appeal at 37. None of these actions could relieve Bellino of his fiduciary duty not to act adversely to the corporation of which he was the president, a director, and a 50-percent shareholder. McGrath North asserts that Bellino's claim for legal malpractice was based on the attorneys' failure to pursue a particular strategy. And they argue that under Nebraska law, a dispute over a choice of strategies or an error of judgment by the attorney on unsettled law is not actionable. The problem is there was no strategy to pursue.

[10,11] *Anderson v. Clemens Mobile Homes* does not set forth an "undefined exception" to the factual situation presented in the case at bar. A director or other corporate officer cannot acquire an interest adverse to that of the corporation while acting for the corporation or when dealing individually with third persons. *Anderson v. Bellino*, 265 Neb. 577, 658 N.W.2d 645 (2003); *Anderson v. Clemens Mobile Homes, supra*. An officer or director of a corporation occupies a fiduciary relation toward the corporation and its stockholders and should refrain from all acts inconsistent with his or her corporate duties. *Electronic Development Co. v. Robson*, 148 Neb. 526, 28 N.W.2d 130 (1947).

[12-14] In addition, this court has held that shareholders in a close corporation owe one another the same fiduciary duty as that owed by one partner to another in a partnership. *Russell v. First York Sav. Co.*, 218 Neb. 112, 352 N.W.2d 871 (1984), *disapproved on other grounds, Van Pelt v. Greathouse*, 219 Neb. 478, 364 N.W.2d 14 (1985). See, also, *I. P. Homeowners v. Radtke*, 5 Neb. App. 271, 558 N.W.2d 582 (1997) (holding that stockholders in close corporation owed fiduciary duty to corporation). Partners must exercise the utmost good faith in all their dealings with the members of the firm and must always act for the common benefit of all. *Bode v. Prettyman*, 149 Neb. 179, 30 N.W.2d 627 (1948). A partner has a duty to refrain from competing with the partnership in the conduct of the partnership business before the dissolution of the partnership. Neb. Rev. Stat. § 67-424 (Reissue 2003). Accordingly, Bellino, as the president, a director, and a shareholder in a close corporation, had a duty to act in the best interests of Lottery. No justification

for his conduct existed in Nebraska law, and McGrath North negligently advised Bellino to act contrary to such duty.

We reject McGrath North's argument that its advice to Bellino was not negligent. The trial court was correct in refusing to find as a matter of law that McGrath North's conduct did not constitute professional negligence.

(ii) Proximate Cause

[15] McGrath North claims the trial court erred in failing to hold as a matter of law that the conduct of the attorneys was not the proximate cause of Bellino's damages. A proximate cause is a cause that produces a result in a natural and continuous sequence and without which the result would not have occurred. *Smith v. Colorado Organ Recovery Sys.*, 269 Neb. 578, 694 N.W.2d 610 (2005). McGrath North argues that its advice did not proximately cause Bellino's damages because there was no evidence of any legally permissible alternative that could have been recommended other than a buyout. However, the record shows that expert witnesses for Bellino testified that, given Bellino's goals and the severely strained relationship between him and Anderson, McGrath North should have considered, among other alternatives, judicial dissolution.

Friedman, a retired law professor, testified that McGrath North gave Bellino the wrong advice in telling him to submit the competing bid. Friedman stated that dissolving the corporation was an option that should have been considered. Lowell Moore, an attorney, also testified that an action to dissolve the company was an option available to Bellino. After being instructed on proximate cause and that the measure of damages was the amount of loss actually sustained as a proximate result of the attorneys' conduct, the jury found in favor of Bellino.

[16] A directed verdict is proper at the close of all the evidence only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is to say, when an issue should be decided as a matter of law. *Rod Rehm, P.C. v. Tamarack Amer.*, 261 Neb. 520, 623 N.W.2d 690 (2001). On a motion for judgment notwithstanding the verdict, the moving party is deemed to have admitted as true all the relevant evidence admitted that is favorable to the party against whom

the motion is directed, and, further, the party against whom the motion is directed is entitled to the benefit of all proper inferences deducible from the relevant evidence. *Munstermann v. Alegent Health*, 271 Neb. 834, 716 N.W.2d 73 (2006). To sustain a motion for judgment notwithstanding the verdict, the court resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw but one conclusion. *Id.* If there is any evidence which will sustain a finding for the party against whom the motion is made, the case may not be decided as a matter of law. *Rod Rehm, P.C. v. Tamarack Amer., supra.*

Giving Bellino the benefit of all proper inferences deducible from the relevant evidence, the district court found that reasonable minds could conclude that other legal options were available to Bellino, options which should have been suggested by his lawyers. We conclude that the trial court did not err in refusing to decide as a matter of law that McGrath North's negligence did not proximately cause Bellino's loss.

(c) Testimony Regarding Action to Dissolve Corporation

Bellino's expert witnesses testified that McGrath North should have considered and advised Bellino of other alternatives, including the possibility of a dissolution action. McGrath North asserts that the district court erroneously delegated its duty to the jury to decide whether the uncontested facts formed a basis for Bellino to bring a dissolution action under the dissolution statute, Neb. Rev. Stat. § 21-20,162 (Cum. Supp. 2006). The record does not support this assertion. The jury was not instructed to determine whether a basis existed for dissolution but whether Bellino had proved by the greater weight of the evidence (1) the existence of an attorney-client relationship, (2) negligence by McGrath North, (3) proximate cause, and (4) damages.

McGrath North also claims the district court erred in allowing Bellino's witnesses to discuss whether a sufficient basis existed for judicial dissolution of Lottery, since that determination was a question of law for the district court. It relies on *Sports Courts of Omaha v. Brower*, 248 Neb. 272, 534 N.W.2d 317 (1995), in which this court held that expert testimony concerning a

question of law is generally not admissible in evidence. In *Sports Courts of Omaha*, a law professor opined that the actions taken by an attorney on behalf of his client with regard to certain stock constituted a disposition of collateral under the Uniform Commercial Code. We found that because there was no dispute as to the actions of the attorney, whether those actions constituted a disposition of collateral as contemplated in the code was a matter of statutory interpretation, which was a question of law.

In the present case, Bellino's experts did not interpret the judicial dissolution statute. Friedman explained generally what it means to dissolve a corporation. She opined that a lawyer of ordinary skill and prudence would have researched the law, including the statutes, and she concluded that dissolving the corporation would have been a viable option for Bellino. Neither did Moore attempt to interpret Nebraska law. He stated that when the owners of a small corporation cannot agree, a dissolution action is a procedure available to them whereby their interests could be divided. He opined that a dissolution action was an option for Bellino.

In *Boyle v. Welsh*, 256 Neb. 118, 589 N.W.2d 118 (1999), we held that expert testimony in an action for legal malpractice is normally required to establish an attorney's standard of conduct in a particular circumstance and whether the attorney's conduct was in conformity therewith. The required standard of conduct is that the attorney exercise such skill, diligence, and knowledge as that commonly possessed by attorneys acting in similar circumstances. *Id*. Although this general standard is established by law, the question of what an attorney's specific conduct should be in a particular case and whether an attorney's conduct fell below that specific standard is a question of fact. *Id.*

To determine how the attorney should have acted in a given case, the jury will often need expert testimony describing what law was applicable to the client's situation. A "'"jury cannot rationally apply a general statement of the standard of care unless it is aware"' of what the common attorney would have done in similar circumstances." *Id*. at 124, 589 N.W.2d at 124. Testimony about the relevant law is often essential to assist the jury in determining what knowledge is commonly possessed by

lawyers acting in similar circumstances and whether the attorney exercised common skill and diligence in ascertaining the legal options available to his or her client. Attorneys represent their clients in legal matters; thus, in an action for professional negligence, the law is ingrained in the canvas upon which the picture of the attorney-client relationship is painted for the jury.

A trial court's ruling in receiving or excluding an expert's testimony which is otherwise relevant will be reversed only when there has been an abuse of discretion. *Epp v. Lauby*, 271 Neb. 640, 715 N.W.2d 501 (2006). We conclude that the district court did not abuse its discretion in permitting Bellino's expert witnesses to testify that a dissolution action was a viable option.

(d) Motion for New Trial

[17] To be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party assigning the error. *Betterman v. Department of Motor Vehicles*, 273 Neb. 178, 728 N.W.2d 570 (2007). Although McGrath North assigns as error the overruling of its motion for new trial, no argument is made in support of this assignment. Thus, we do not address it.

2. Bellino's Appeal: Award of Damages

The jury found that the negligence of Bellino's attorneys caused him $1.6 million in damages. The district court in part sustained McGrath North's motion for judgment notwithstanding the verdict, concluded that the evidence did not support the $1.6 million verdict, and reduced the award of damages to $229,036.40, the amount Bellino paid for legal and accounting services in defending the Anderson lawsuit. The court reasoned that Bellino's goals were to terminate his business relationship with Anderson and retain the La Vista keno contract. In order to attain his goals, the court found, Bellino would have been required to buy out Anderson, even if the advice of the attorneys had not been negligent. It therefore concluded that the only loss to Bellino proximately caused by the negligence of McGrath North was the lawsuit brought against him by Anderson. Bellino appealed and has assigned the reduction of damages as error.

In reviewing the district court's grant of judgment notwithstanding the jury verdict, we are guided by well-established principles. To sustain a motion for judgment notwithstanding the verdict, the court resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw but one conclusion. *Munstermann v. Alegent Health*, 271 Neb. 834, 716 N.W.2d 73 (2006). The party against whom the motion is directed is entitled to the benefit of all proper inferences deducible from the relevant evidence. *Id.*

[18] The jury was instructed that the general measure of damages in a legal malpractice action is the amount of loss actually sustained by the claimant as a proximate result of the attorney's conduct. See *Eno v. Watkins*, 229 Neb. 855, 429 N.W.2d 371 (1988). A proximate cause is a cause that produces a result in a natural and continuous sequence and without which the result would not have occurred. *Smith v. Colorado Organ Recovery Sys.*, 269 Neb. 578, 694 N.W.2d 610 (2005).

In early 1998, Bellino sought to end his business relationship with Anderson. Each of them was a 50-percent shareholder in Lottery and an officer and a director. Lottery had a keno contract with La Vista that was set to expire July 31, 1998. Bellino wanted to continue in the keno business without Anderson. The evidence, considered in a light most favorable to Bellino, indicated that Bellino was not properly informed of his fiduciary duties as the president, a director, and a shareholder of Lottery, a close corporation. Further evidence indicated he was not properly informed that a constructive trust could result. Erroneous legal advice that causes the client to breach a fiduciary duty to such a corporation can be devastating to the client. Bellino was forced to remain in business with Anderson, via the constructive trust, under a 10-year keno contract with La Vista.

Bellino presented expert testimony at trial concerning the damages proximately caused by the negligent advice of McGrath North. Panzer, a certified public accountant, testified that Bellino settled with Anderson in July 2004 to end the constructive trust, separate from Anderson, and maintain the keno operation. Panzer testified that the monetary loss sustained by Bellino due to the legal advice given by his attorneys exceeded $3.1 million. This sum included: legal and accounting fees incurred in

the Anderson litigation—$176,373.48 and $52,662.92, respectively; settlement payments to Anderson totaling $2,427,729.76; interest in the amount of $190,182.60 on personal loans taken by Bellino for the settlement payments; and the lost economic benefit, calculated at $325,773.27, of money Bellino was forced to use to settle with Anderson.

[19] In an action for legal malpractice, the plaintiff must establish that but for the alleged negligence of the attorney, the plaintiff would have obtained a more favorable judgment or settlement. *Viner v. Sweet*, 30 Cal. 4th 1232, 70 P.3d 1046, 135 Cal. Rptr. 2d 629 (2003). See *Bowers v. Dougherty*, 260 Neb. 74, 615 N.W.2d 449 (2000). The jury found that Bellino had sustained damages in the amount of $1.6 million as a proximate result of McGrath North's negligent representation. Sufficient evidence was presented to the jury to support a finding that these damages included the cost to Bellino as a result of the Anderson settlement in July 2004.

In its motion for judgment notwithstanding the verdict, McGrath North argued that the jury's verdict was based on the difference between (1) the amount ($1.5 million) for which Anderson had offered to settle the case after the trial and before this court's ruling in *Anderson v. Bellino*, 265 Neb. 577, 658 N.W.2d 645 (2003), and (2) the expenses Bellino actually spent to settle the case after the appeal, which amount McGrath North contended was approximately $3.1 million. McGrath North argued that the jury's verdict was improper because it was based on Bellino's own decision to reject Anderson's settlement offer.

The district court determined that at some point, regardless of McGrath North's negligent advice, Bellino would have been required to buy out Anderson in order to terminate their business relationship and retain the keno contract. Because a buyout was inevitable, the court found that the payment to Anderson could not be proximately caused by McGrath North's negligence. The court determined that the difference in the settlement price before and after the litigation was concluded was not proximately caused by McGrath North because Bellino made the ultimate decision to reject the first offer. We disagree.

Before the litigation in *Anderson v. Bellino, supra*, was concluded, Anderson offered to settle for $1.5 million. McGrath

North advised Bellino that he could "do much better" on appeal. The issue is whether the legal advice given to Bellino increased the cost of severing his business relationship with Anderson.

McGrath North represented Bellino throughout the litigation with Anderson. Before trial, Bellino's attorneys told Bellino he would win on the points of law. After Bellino lost at trial, he was assured by counsel that the judge's ruling was wrong.

There was evidence that in December 2002 (i.e., before this court affirmed the judgment in *Anderson v. Bellino, supra*), Anderson offered to settle the litigation and yield his interest in the keno operation to Bellino for $1.5 million. Bellino was told by his legal counsel that his chances for a successful appeal of the district court's decision were favorable and that the appeal would result in a better outcome than a $1.5 million settlement. Panzer, who participated in discussions concerning a possible settlement, said that counsel persistently told Bellino that after the appeal was decided, Bellino and Anderson would "split the baby," but there was no suggestion that Bellino would be required to keep paying Anderson from Keno's profits for the entirety of the La Vista contract. Bellino said that he continued to move forward with his appeal to this court due to his lawyers' advice.

That advice concerning the appeal was wrong. The law in Nebraska is clear that a person who is an officer, director, and shareholder of a closely held corporation has a fiduciary duty not to act adversely to that corporation. Given the facts in this case, it was inevitable that a court would determine Bellino had breached his fiduciary duty to Lottery.

Although the decision whether to settle the controversy is ultimately left to the client, see *Wood v. McGrath, North*, 256 Neb. 109, 589 N.W.2d 103 (1999), evidence showed that Bellino relied greatly on the ongoing legal advice of McGrath North that he would prevail on appeal when he chose to forgo settlement and wait for the appeals process to run its course. We have recognized that

> "'litigants rely heavily on the professional advice of counsel when they decide whether to accept or reject offers of settlement, and we [have] insist[ed] that the lawyers of our state advise clients with respect to settlements with

> the same skill, knowledge, and diligence with which they pursue all other legal tasks.'"

McWhirt v. Heavey, 250 Neb. 536, 546, 550 N.W.2d 327, 334 (1996).

In *Streber v. Hunter*, 221 F.3d 701 (5th Cir. 2000), attorneys incorrectly advised their client on how to treat a large sum of money for tax purposes, and the Internal Revenue Service issued a notice of deficiency against the client. Evidence indicated that the Internal Revenue Service would have settled the case but that the attorneys insisted the client would win at trial. Based on that advice, the client did not settle. The client lost at the tax trial, and the judgment against her was substantially more than the settlement would have been.

The client brought an action for legal malpractice against the attorneys. Following a trial, the jury returned a verdict in favor of the client. The largest portion of damages represented the difference between the amount of money the client would have paid the Internal Revenue Service had the attorneys advised her correctly and the amount she eventually had to pay. The attorneys appealed.

The U.S. Court of Appeals for the Fifth Circuit considered whether the evidence supported the jury's determination that the lawyers' overall conduct, particularly their advice that the client would win at the tax trial and that therefore, she should not settle, fell below the standard of care. Expert testimony had been presented that the attorneys' tax advice had been wrong from the start and that the attorneys failed to adequately inform the client of the apparent outcome of the tax case. The client testified that she would have settled but did not because the attorneys told her she would be successful in the tax trial. The court found that based on the facts and in light of the applicable tax law, the attorneys performed negligently by failing to advise the client to settle. The evidence, reviewed in a light favorable to the client, was sufficient to sustain the jury's damage award.

In the present case, Bellino's attorneys advised him to set up Keno and bid against Lottery for the La Vista contract. Moore, one of Bellino's experts, testified that this advice caused Bellino "to become involved in litigation where there was virtually no chance of him being successful." Bellino continued to rely on

his attorneys' advice throughout the resulting litigation. Moore testified that McGrath North fell below the standard of care by not advising Bellino that he was likely to lose the case. The jury could reasonably have inferred that the failure of counsel to properly advise Bellino of the apparent outcome of his appeal was a proximate cause of his decision not to pay the $1.5 million which Anderson requested to settle the matter.

The district court found that Bellino would inevitably have to buy out Anderson but did not consider that the price of such buyout could have been increased as a result of McGrath North's negligent representation. The jury could reasonably have concluded, based on the evidence, that it cost Bellino more to purchase Anderson's interest after the litigation and judgment against Bellino than before such judgment. The jury could reasonably have determined that Anderson's settlement offer of $1.5 million established a baseline number for what it would have cost Bellino to buy out Anderson.

After Bellino did not accept Anderson's offer, Bellino's appeal continued until this court affirmed the judgment in favor of Anderson. Friedman, one of Bellino's experts, testified that Bellino "suffered terribly monetarily after the [Nebraska] Supreme Court rendered its opinion" in *Anderson v. Bellino*, 265 Neb. 577, 658 N.W.2d 645 (2003). The constructive trust was imposed, and Bellino was locked into the existing arrangement for several more years.

The evidence, viewed favorably to Bellino, indicated that following the conclusion of the appeal, it cost Bellino in excess of $3.1 million to attain his goal of separating from Anderson and continuing the keno operation. The settlement with Anderson satisfied all obligations and sums owed to Anderson as a result of the constructive trust, including all profits currently due Anderson or to which he would be entitled in the future under the La Vista keno contract. The jury could reasonably have concluded that but for the negligence of McGrath North, Bellino would have paid substantially less to attain his stated goals.

On its motion for judgment notwithstanding the verdict, McGrath North was deemed to have admitted as true all the relevant evidence favorable to Bellino and Bellino was entitled to the benefit of all proper inferences deducible from the relevant

evidence. See *Munstermann v. Alegent Health*, 271 Neb. 834, 716 N.W.2d 73 (2006). The amount of damages awarded by the jury was supported by the evidence, bore a reasonable relationship to the elements of the damages proved, and was not such that reasonable minds could draw but one conclusion on the issue of damages. See *Genthon v. Kratville*, 270 Neb. 74, 701 N.W.2d 334 (2005).

We conclude that the district court erred in sustaining the motion for judgment notwithstanding the verdict and in reducing the damages to $229,036.40.

VI. CONCLUSION

The district court erred in partially sustaining McGrath North's motion for judgment notwithstanding the verdict and disturbing the jury verdict. We reverse the district court's order reducing the award of damages. In all other respects, the court's order and rulings are affirmed. We remand the cause to the district court with direction to reinstate the jury verdict and judgment in favor of Bellino.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTION.

McCORMACK, J., not participating.

ORCHARD HILL NEIGHBORHOOD ASSOCIATION ET AL., APPELLEES, V. ORCHARD HILL MERCANTILE, L.L.C., APPELLANT, AND NEBRASKA LIQUOR CONTROL COMMISSION, APPELLEE.

738 N.W.2d 820

Filed August 17, 2007. No. S-06-228.

1. **Trial: Expert Witnesses: Appeal and Error.** A trial court has discretion in deciding whether a witness is qualified to testify as an expert, and an appellate court will not disturb the trial court's decision unless it is clearly erroneous.
2. **Administrative Law: Final Orders: Appeal and Error.** Under the Administrative Procedure Act, Neb. Rev. Stat. §§ 84-901 to 84-920 (Reissue 1999 & Cum. Supp. 2006), an appellate court may reverse, vacate, or modify a district court's judgment or final order for errors appearing on the record.
3. **Administrative Law: Judgments: Appeal and Error.** When reviewing a district court's order under the Administrative Procedure Act, Neb. Rev. Stat. §§ 84-901 to

84-920 (Reissue 1999 & Cum. Supp. 2006), for errors appearing on the record, an appellate court looks at whether the decision conforms to the law, is supported by competent evidence, and is not arbitrary, capricious, or unreasonable.

4. **Courts: Jurisdiction.** Although not a constitutional prerequisite for jurisdiction, an actual case or controversy is necessary for the exercise of judicial power.
5. **Moot Question: Words and Phrases.** A case becomes moot when the issues initially presented in the litigation cease to exist, when the litigants lack a legally cognizable interest in the outcome of litigation, or when the litigants seek to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive.
6. **Administrative Law: Liquor Licenses.** Nebraska statutes establish a renewal privilege, and liquor licensees are entitled to renewal, absent a change of circumstances indicated on the licensee's renewal application.
7. **Constitutional Law: Administrative Law: Liquor Licenses.** A liquor licensee has a constitutionally protected interest in obtaining renewal of an existing license.
8. **Rules of Evidence: Expert Witnesses.** Under Neb. Evid. R. 702, Neb. Rev. Stat. § 27-702 (Reissue 1995), a witness can testify concerning scientific, technical, or other specialized knowledge only if the witness qualifies as an expert.
9. **Trial: Expert Witnesses.** Whether a witness qualifies as an expert is a preliminary question for the trial court.
10. **Expert Witnesses.** A court should not admit expert testimony if it appears the witness does not possess facts that will enable him or her to express an accurate conclusion, as distinguished from a mere guess or conjecture.
11. **Expert Witnesses: Records.** A court should reject an expert's opinion if the record does not support a finding that the expert had a sufficient foundation for his or her opinion.
12. **Appeal and Error.** When an issue is raised for the first time in an appellate court, the court will disregard it because the district court cannot commit error in resolving an issue never presented and submitted to it for disposition.
13. **Judgments: Appeal and Error.** An appellate court will not substitute its factual findings for those of the district court when competent evidence supports the district court's findings.

Appeal from the District Court for Lancaster County: JOHN A. COLBORN, Judge. Affirmed.

Michael J. Lehan for appellant.

Steven M. Virgil, and Matthew Andrew, Senior Certified Law Student, of Community Economic Development Clinic, Creighton University School of Law, for appellees Orchard Hill Neighborhood Association et al.

No appearance for appellee Nebraska Liquor Control Commission.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

CONNOLLY, J.

The Orchard Hill Neighborhood Association and neighborhood residents (collectively the Objectors) appealed the order of the Nebraska Liquor Control Commission (Commission) granting a liquor license to Orchard Hill Mercantile, doing business as Hamilton Outlet Tobacco (Mercantile). On review, the district court found that under Neb. Rev. Stat. § 53-132(2) (Reissue 2004), the "public convenience and necessity" did not require the issuance of the liquor license. The court reversed the Commission's decision, and Mercantile appeals. Because competent evidence supports the district court's decision, we affirm.

I. BACKGROUND

Mercantile applied for a retail class D liquor license at 4026 Hamilton Street, Omaha, Nebraska. With the license, Mercantile could sell off-sale package liquor. Under Neb. Rev. Stat. § 53-133 (Reissue 2004), two neighbors and a pastor of a nearby church protested.

1. HEARING BEFORE THE COMMISSION

(a) Expert Testimony Against Issuing the License

Under Neb. Rev. Stat. § 84-914(1) (Reissue 1999), the Objectors requested the Commission comply with the rules of evidence. Two experts testified for the Objectors. The first expert was Dr. Rebecca K. Murray, who is an assistant professor of sociology and anthropology at Creighton University. She received her master's degree and doctorate from the University of Nebraska at Omaha. Her research focuses on environmental criminology—studying how urban structures affect crime within particular areas. Although she is not familiar with the Hamilton Street neighborhood (Neighborhood), she has studied how liquor establishments affect automobile thefts and assaults in Omaha; she testified that a correlation exists between crime and liquor establishments. She opined that assaults rise by 1.0959 per year per block when increasing the number of off-sale

liquor-serving establishments from zero to one; assaults rise by 2.0117 when increasing the number of liquor establishments from one to two. Presently, one liquor store—about one-half to one block from Mercantile's proposed location—serves the Neighborhood. Presently, two to three assaults occur per year in the Neighborhood. Murray stated her research methodology is generally accepted in her field.

Relying on her research, training, and education, Murray opined that issuing a liquor license to Mercantile at the proposed location would not serve the public's interests. She added that a liquor establishment would increase crime anywhere in Omaha, but that the Neighborhood, a residential area, already has a higher crime rate compared with the city as a whole. She further stated that her opinion was her "best-guess" based on her research.

The second expert was Dr. Russell L. Smith, who teaches urban studies and public administration at the University of Nebraska at Omaha. He has a doctorate in political science. He focuses on public policy, urban revitalization, and community development. Smith is familiar with the Neighborhood because he works with programs and projects concerning the Neighborhood. In addition, he has conducted surveys and focus groups on issues regarding the Neighborhood. He testified that the Neighborhood is in an "advanced state of decline," as evidenced by the number of vacant lots, declines in housing values, and a population decrease. He stated that the deteriorated commercial strip showed promise for revitalization efforts, but that putting a liquor store there would be a "disservice" to the Neighborhood. Smith conducted a survey that found 42 percent of the respondents have concerns about illegal alcohol use in the Neighborhood. He opined that Mercantile's liquor store would negatively affect the surrounding community.

(b) Other Evidence Regarding the Neighborhood

The record reflects that while graffiti, loitering, and traffic violations have increased, the Neighborhood is improving. The Omaha Community Foundation has invested about $250,000 in private donations for community development, including home improvement, a community gardening project, and after-school

programs. Also, the city of Omaha is preparing a redevelopment plan for the area.

(c) Mercantile's Evidence Supporting the License

The proposed site complies with zoning requirements, and sanitary and sewer systems are in place. The city recommended that the Commission grant the license. Also, Mercantile's owners have invested about $1.5 million, improving several buildings in the Neighborhood. Charles Kline, an owner, testified that more than 400 people would like Mercantile to provide liquor at the proposed location. He testified that the site would have adequate parking—15 parking spots and an estimated 200 customers per day. Contrary to the expert testimony, Kline testified that within the last year or two, property values have increased. Mercantile's owners believe their liquor store will serve the public interest.

(d) The Commission's Decision

At the hearing's conclusion, the Commission unanimously voted to approve the license, and on July 5, 2005, the Commission entered its order.

2. The District Court Decision

The Objectors appealed the Commission's decision to the district court. They contended that the Commission's order issuing the license was arbitrary and capricious and that the evidence did not support it.

The district court, reviewing the record of the Commission de novo,[1] found that under the Nebraska Liquor Control Act,[2] the present or future public convenience and necessity did not require the liquor license. The court relied on "the slim margin by which the City Council voted to approve [Mercantile's] application; the existence of a strong, proactive citizen protest; and the existence of another liquor-selling establishment in such close proximity to the proposed location." The court further found that issuing the license would frustrate the positive trend occurring in the

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[1] See Neb. Rev. Stat. § 84-917(5)(a) (Reissue 1999).

[2] Neb. Rev. Stat. §§ 53-101 to 53-1,122 (Reissue 2004).

Neighborhood. The court balanced these concerns against its findings that (1) Mercantile's owners are qualified, (2) the site complied with zoning and sanitation requirements, and (3) the site presented no parking concerns.

II. ASSIGNMENTS OF ERROR

Mercantile assigns that the district court erred in (1) reversing the Commission's decision as arbitrary, unreasonable, and not supported by competent evidence; (2) considering expert testimony based on "guess and conjecture" which was not relevant to the issues; (3) considering expert testimony when the record contains no findings that the trier of fact performed its role as a gatekeeper; (4) interpreting § 53-132(3); (5) considering only one element of the factors set forth in § 53-132(3); (6) relying on *City of Lincoln v. Nebraska Liquor Control Comm.*[3] in determining that a single factor may require reversal of an order of the Commission; and (7) failing to dismiss Orchard Hill Neighborhood Association for lack of standing.

III. STANDARD OF REVIEW

[1] A trial court has discretion in deciding whether a witness is qualified to testify as an expert, and we will not disturb the trial court's decision unless it is clearly erroneous.[4]

[2,3] Under the Administrative Procedure Act,[5] we may reverse, vacate, or modify a district court's judgment or final order for errors appearing on the record.[6] When reviewing a district court's order under the Administrative Procedure Act for errors appearing on the record, we look at whether the decision conforms to the law, is supported by competent evidence, and is not arbitrary, capricious, or unreasonable.[7]

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[3] *City of Lincoln v. Nebraska Liquor Control Comm.*, 261 Neb. 783, 626 N.W.2d 518 (2001).

[4] See *Carlson v. Okerstrom*, 267 Neb. 397, 675 N.W.2d 89 (2004).

[5] Neb. Rev. Stat. §§ 84-901 to 84-920 (Reissue 1999 & Cum. Supp. 2006).

[6] See *Stejskal v. Department of Admin. Servs.*, 266 Neb. 346, 665 N.W.2d 576 (2003). See, also, § 84-918(3).

[7] *Stejskal v. Department of Admin. Servs., supra* note 6.

IV. ANALYSIS

1. The Controversy Is Not Moot

Before reaching the legal issues presented, we address a jurisdictional issue raised by the Objectors. The Objectors contend that Mercantile's appeal is moot. Under Nebraska statute, a liquor license cannot exceed 1 year.[8] The Objectors argue that more than 1 year has passed since July 5, 2005, when the Commission first issued a liquor license to Mercantile. The record shows that Mercantile attempted to renew its license but that the Commission denied its request because of the district court's decision. The Objectors argue that because Mercantile's liquor license has expired and the Commission has not renewed it, the Commission cannot reinstate it. They argue the case is moot and that we cannot grant relief on appeal. We disagree.

[4,5] Although not a constitutional prerequisite for jurisdiction, an actual case or controversy is necessary for the exercise of judicial power.[9] A case becomes moot when the issues initially presented in the litigation cease to exist, when the litigants lack a legally cognizable interest in the outcome of litigation, or when the litigants seek to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive.[10]

The Maryland Court of Appeals considered a mootness argument under analogous facts. In *Bethesda Management Serv. v. Dep't*,[11] the appellants held licenses to operate employment agencies. The Maryland Department of Licensing and Regulation, Division of Labor and Industry, revoked the appellants' licenses, and they appealed. The department argued that the case was moot because the revoked licenses lasted for 1 year and would have expired by their own terms by the time the case reached the appellate court. The appellants had unsuccessfully applied for new licenses for the next year. The court, however, concluded

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[8] § 53-149.

[9] See *Johnston v. Nebraska Dept. of Corr. Servs.*, 270 Neb. 987, 709 N.W.2d 321 (2006).

[10] *Id.*

[11] *Bethesda Management Serv. v. Dep't*, 276 Md. 619, 350 A.2d 390 (1976).

that the case still presented a live controversy. The court reasoned that if the revocation stood, the department would not issue a new license to the appellants. The court stated, "[I]f it should be ultimately determined that the revocations were unwarranted, and no other cognizable grounds for denial existed, appellants would be entitled to new licenses."[12] The court held that the appellants had a real interest in the outcome of the case.

[6,7] Here, although Mercantile's original liquor license has expired, the controversy is not moot. Nebraska statutes establish a renewal privilege, and liquor licensees are entitled to renewal, absent a change of circumstances indicated on the licensee's renewal application.[13] We have recognized that a liquor licensee has a constitutionally protected interest in obtaining renewal of an existing license.[14] That interest would be jeopardized if the license were wrongfully taken away. Because Mercantile has an interest in judicial resolution beyond the expiration of its original license, the controversy is not moot.

2. The Hearing Officer Properly Admitted the Expert Testimony

[8,9] Mercantile contends that the testimony of Murray, Smith, and another witness, Dr. Andrew Jameton, was inadmissible as expert testimony. Under Neb. Evid. R. 702,[15] a witness can testify concerning scientific, technical, or other specialized knowledge only if the witness qualifies as an expert. Whether a witness qualifies as an expert is a preliminary question for the trial court.[16] A trial court is allowed discretion in deciding whether a witness qualifies to testify as an expert. And unless

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[12] *Id.* at 626, 350 A.2d at 394.

[13] *Grand Island Latin Club v. Nebraska Liq. Cont. Comm.*, 251 Neb. 61, 554 N.W.2d 778 (1996); *Pump & Pantry, Inc. v. City of Grand Island*, 233 Neb. 191, 444 N.W.2d 312 (1989). See, also, §§ 53-135 and 53-135.02.

[14] *Grand Island Latin Club v. Nebraska Liq. Cont. Comm., supra* note 13.

[15] Neb. Rev. Stat. § 27-702 (Reissue 1995).

[16] *Carlson v. Okerstrom, supra* note 4.

the court's finding is clearly erroneous, we will not disturb that decision on appeal.[17]

(a) Murray Provided Sufficient Foundation for Her Opinion

[10,11] Mercantile contends that Murray based her testimony on a "'best guess scenario'" and that she lacked knowledge of the Neighborhood.[18] Mercantile's objection appears to be a foundational challenge, and that is how we will address it. A court should not admit expert testimony if it appears the witness does not possess facts that will enable him or her to express an accurate conclusion, as distinguished from a mere guess or conjecture.[19] That is, a court should reject an expert's opinion if the record does not support a finding that the expert had a sufficient foundation for his or her opinion.[20]

We discussed an evidentiary foundation issue in *Scurlocke v. Hansen*.[21] There, the witness testified regarding the cost to restore trees damaged by a bulldozer. He, however, had no experience estimating such damages, he estimated the cost to restore the property to its original condition without having seen it before the damage, he took no measurements, and his "methodology" consisted of "walking around the [plaintiff's] property and trying to 'visualize' where trees had been prior [to the damage]."[22] We decided the skeletal foundation could not support his opinion.

In contrast, Murray fleshed out the foundation for her opinion. She relied on her research of the city. She examined felonious assaults and automobile thefts occurring in the city and the number of liquor-serving establishments. She used census data to control for other variables, including income, racial composition,

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[17] *Id.*

[18] Brief for appellant at 11.

[19] See, *City of Lincoln v. Realty Trust Group*, 270 Neb. 587, 705 N.W.2d 432 (2005); *Scurlocke v. Hansen*, 268 Neb. 548, 684 N.W.2d 565 (2004).

[20] See *City of Lincoln v. Realty Trust Group, supra* note 19.

[21] *Scurlocke v. Hansen, supra* note 19.

[22] *Id.* at 552, 684 N.W.2d at 569.

and land ownership at the block level. She testified that based on her research of a citywide trend, crime would increase in the Neighborhood with the establishment of an additional liquor store. Murray also testified the Neighborhood already averaged more crime per year than other areas, suggesting that an increase in crime there could be more detrimental.

Mercantile attempts to characterize Murray's testimony as "mere guess or conjecture"[23] under *Scurlocke* because she testified that her opinion regarding the effect of a liquor store in the Neighborhood was her "best-guess." The record reveals, however, that Murray clarified that any opinion about future events has some uncertainty, and repeated that she based her opinion on her research. We believe this case is distinguishable from *Scurlocke*. Murray's background and research provided sufficient foundation for her opinion. The hearing officer did not clearly err in admitting Murray's testimony.

(b) Mercantile Did Not Raise a *Daubert* Challenge at the Commission Hearing

Mercantile also challenges Smith's and Jameton's testimony. It argues that they failed to explain their methodology and whether it was applied in a reliable manner. Mercantile appears to invoke a challenge under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[24] and *Schafersman v. Agland Coop*.[25] But the record shows that Mercantile, at the Commission hearing, did not object because of methodology. Instead, Mercantile objected to Smith's testimony on relevance, hearsay, and foundation. And it objected to Jameton's testimony as hearsay. Further, Mercantile did not challenge either witness' methodology before the district court.

[12] When an issue is raised for the first time in this court, we will disregard it because the district court cannot commit error in resolving an issue never presented and submitted to it

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[23] Brief for appellant at 11.

[24] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993).

[25] *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001). See, also, *City of Lincoln v. Realty Trust Group, supra* note 19.

for disposition.[26] Because Mercantile did not object before the Commission or the district court, we do not address this issue.

3. The District Court Properly Considered the Criteria in § 53-132(3)

Mercantile argues that the district court failed to consider all of the statutory criteria in § 53-132(3) in determining whether the Commission correctly issued the liquor license. Section 53-132(2) of the Nebraska Liquor Control Act provides the requirements for issuing a retail liquor license. To issue a retail liquor license, the Commission must find that the license satisfies each condition specified in § 53-132(2)(a) through (d).[27] Subsection (d) provides that the issuance of a license must be "required by the present or future public convenience and necessity." In deciding whether an application meets these requirements, the Commission must consider each factor listed in § 53-132(3)(a) through (j).[28] When the Commission conducted the hearing, those factors were:

> (a) The recommendation of the local governing body;
>
> (b) The existence of a citizens' protest made in accordance with section 53-133;
>
> (c) The existing population of the city, village, or county and its projected growth;
>
> (d) The nature of the neighborhood or community of the location of the proposed licensed premises;
>
> (e) The existence or absence of other retail licenses or craft brewery licenses with similar privileges within the neighborhood or community of the location of the proposed licensed premises;
>
> (f) The existing motor vehicle and pedestrian traffic flow in the vicinity of the proposed licensed premises;
>
> (g) The adequacy of existing law enforcement;
>
> (h) Zoning restrictions;

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[26] See *Ways v. Shively*, 264 Neb. 250, 646 N.W.2d 621 (2002).

[27] *City of Lincoln v. Nebraska Liquor Control Comm., supra* note 3.

[28] *Id.*

(i) The sanitation or sanitary conditions on or about the proposed licensed premises; and

(j) Whether the type of business or activity proposed to be operated in conjunction with the proposed license is and will be consistent with the public interest.[29]

We discussed the above factors in *City of Lincoln v. Nebraska Liquor Control Comm.*[30] There, we considered whether the Commission properly issued a liquor license when the proposed location failed to meet zoning requirements. We stated that no one factor invariably controls the decision to grant or deny a liquor license. All of the factors in § 53-132(3) must be considered in determining whether an applicant meets the requirements of § 53-132(2). In *City of Lincoln*, we decided that because the location did not comply with zoning requirements, the Commission should have denied the license.

In its order, the district court, citing our decision in *City of Lincoln*, stated that "[n]o specific factor 'controls' the decision to grant or deny an application for a liquor license, but in some cases, a single factor may weigh so heavily that it tips the balance one way or the other." Mercantile apparently interprets this statement to mean that the district court relied solely on whether the liquor license was in the public interest, the factor listed in § 53-132(j). The court's order, however, shows it considered all of the statutory factors. In its order, the court listed the factors in § 53-132(3) that the Commission must consider in deciding whether to approve or deny a license application. The court specifically found that several factors weighed against issuing the license and that others weighed in favor of the license. After balancing the factors, the court decided that the "present or future public convenience and necessity" did not require the license under § 53-132(2)(d). In reaching its decision, the court properly considered all of the factors listed in § 53-132(3).

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[29] § 53-132(3).

[30] *City of Lincoln v. Nebraska Liquor Control Comm., supra* note 3.

4. Competent Evidence Supports the District Court's Decision

[13] Mercantile argues that the district court's decision was arbitrary and capricious and lacked competent evidence to support it. When reviewing a district court's order under the Administrative Procedure Act for errors appearing on the record, we look at whether the decision conforms to the law, is supported by competent evidence, and is not arbitrary, capricious, or unreasonable.[31] We will not substitute our factual findings for those of the district court when competent evidence supports those findings.[32]

The district court's order contains a detailed summary of the evidence presented to the Commission. The court examined evidence on all of the statutory factors. In deciding that the Commission should have denied the liquor license, the court wrote:

> [T]his Court finds that the slim margin by which the City Council voted to approve [Mercantile's] application; the existence of a strong, proactive citizen protest; and the existence of another liquor-selling establishment in such close proximity to the proposed location militate strongly against issuance of a license to [Mercantile]. This Court further finds that the nature of the Orchard Hill neighborhood and community, though in a state of decline, is benefiting from the substantial efforts and contributions of public and private entities and donors, and that this positive trend would likely be frustrated by the issuance of a liquor license to [Mercantile]. While this Court finds that there are no zoning or sanitation impediments to granting a license to [Mercantile], that traffic and parking concerns are minor, and that [Mercantile] is in all respects qualified to operate a stable and relatively secure liquor-selling establishment, these factors, on balance, are insufficient to show, as [Mercantile] must, that the issuance of the license

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[31] *Stejskal v. Department of Admin. Servs., supra* note 6.

[32] See *id.*

> to [Mercantile] "is or will be required by the present or future public convenience and necessity."

Adhering to our standard of review for error on the record, we believe the record supports the district court's decision. Expert testimony establishes that a liquor license would negatively affect the Neighborhood and that crime would likely increase. The record contains a petition signed by more than 400 Neighborhood residents opposing the liquor license. Testimony established that another liquor establishment is presently located within one block from Mercantile's proposed location. Although some evidence does weigh in favor of issuing the liquor license, sufficient competent evidence supports the court's decision. We recognize that the Commission also considered the evidence in deciding to issue the liquor license. But under our standard of review, we cannot say that the district court's decision to overturn the Commission's decision was arbitrary, capricious, or unreasonable. The district court did not err in ordering the Commission to deny the license to Mercantile.

V. CONCLUSION

We conclude that Mercantile's appeal is not moot because Mercantile has an existing interest in obtaining relief from the district court's denial of its liquor license. Because competent evidence—including properly admitted expert testimony—supports the court's decision, we affirm. The remaining issues are unnecessary to resolve this case, and we need not address them on appeal.[33]

AFFIRMED.

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[33] See *Ferer v. Erickson, Sederstrom*, 272 Neb. 113, 718 N.W.2d 501 (2006).

W. BEN SNYDER, APPELLEE, V. DEPARTMENT OF MOTOR VEHICLES, AN ADMINISTRATIVE AGENCY OF THE STATE OF NEBRASKA, APPELLANT.

736 N.W.2d 731

Filed August 17, 2007. No. S-06-352.

1. **Administrative Law: Judgments: Appeal and Error.** A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record. When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
2. **Administrative Law: Motor Vehicles: Licenses and Permits: Revocation: Police Officers and Sheriffs: Jurisdiction.** In an administrative license revocation proceeding, the sworn report of the arresting officer must, at a minimum, contain the information specified in the applicable statute in order to confer jurisdiction.

Appeal from the District Court for Douglas County: J. PATRICK MULLEN, Judge. Affirmed.

Jon Bruning, Attorney General, and Edward G. Vierk for appellant.

S. Gregory Nelson for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

STEPHAN, J.

The sole issue in this case is whether a sworn report listing the reasons for an arrest as "Speeding (20 OVER)/D.U.I." is sufficient to confer jurisdiction on the Department of Motor Vehicles (DMV) in an administrative license revocation (ALR) proceeding. We agree with the district court for Douglas County that it is not and, therefore, affirm the judgment of that court which reversed the administrative revocation.

FACTS

On October 6, 2005, at 1:47 a.m., an Omaha police officer stopped a motor vehicle driven by W. Ben Snyder after observing the vehicle speeding. The officer ultimately arrested Snyder for suspicion of driving under the influence. After transporting

him to police headquarters, the officer read Snyder a postarrest chemical test advisement. Snyder then submitted to a chemical test of his breath via an Intoxilyzer 5000 machine. The chemical test showed a blood alcohol concentration over the legal limit.

On October 12, 2005, the director of the DMV received a sworn report completed by the arresting officer. The sworn report stated, among other things, that Snyder was arrested pursuant to Neb. Rev. Stat. § 60-6,197 (Reissue 2004) and listed the reasons for his arrest as "Speeding (20 OVER)/D.U.I." The director also received a petition for an administrative hearing from Snyder, and a hearing on whether Snyder's license should be revoked was held on November 1. Snyder's counsel objected to the director's jurisdiction, arguing that the sworn report did not properly reflect the reasons for the arrest. The hearing officer took the objection under advisement. The arresting officer testified at the hearing. The hearing officer subsequently found that the information in the sworn report was sufficient to confer jurisdiction on the DMV and recommended that Snyder's license be revoked for the statutory period of 90 days. The director adopted this recommendation on November 8.

Snyder timely appealed to the district court, which reversed the director's decision and dismissed the revocation of Snyder's license. The district court reasoned that speeding and "D.U.I." were not sufficient reasons for the arrest and that thus, the sworn report did not confer jurisdiction upon the DMV to revoke Snyder's license. The DMV filed this timely appeal. We moved the case to our docket pursuant to our statutory authority to regulate the caseloads of the appellate courts of this state.[1]

ASSIGNMENT OF ERROR

The DMV assigns, restated, that the district court erred in determining that the reasons for arrest listed in the sworn report were not sufficient to give the DMV jurisdiction to revoke Snyder's license.

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[1] See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

STANDARD OF REVIEW

[1] A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record. When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.[2]

ANALYSIS

Resolution of the issue presented in this appeal requires an examination of the relevant Nebraska statutes and our decision in *Hahn v. Neth*.[3] Nebraska law makes it unlawful

> for any person to operate or be in the actual physical control of any motor vehicle:
>
> (a) While under the influence of alcoholic liquor or of any drug;
>
> (b) When such person has a concentration of eight-hundredths of one gram or more by weight of alcohol per one hundred milliliters of his or her blood; or
>
> (c) When such person has a concentration of eight-hundredths of one gram or more by weight of alcohol per two hundred ten liters of his or her breath.[4]

Any person who operates a motor vehicle in Nebraska is deemed to have given consent to submit to chemical tests for the purpose of determining the concentration of alcohol in the blood, breath, or urine.[5] A police officer may require any person arrested for committing an offense while driving under the influence of alcohol to submit to a chemical test "when the officer has reasonable grounds to believe that such person was driving or was in the actual physical control of a motor vehicle . . . while under the

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[2] *Chase 3000, Inc. v. Nebraska Pub. Serv. Comm.*, 273 Neb. 133, 728 N.W.2d 560 (2007); *Wilson v. Nebraska Dept. of Health & Human Servs.*, 272 Neb. 131, 718 N.W.2d 544 (2006).

[3] *Hahn v. Neth*, 270 Neb. 164, 699 N.W.2d 32 (2005).

[4] Neb. Rev. Stat. § 60-6,196(1) (Reissue 2004).

[5] § 60-6,197(1).

influence of alcoholic liquor."[6] Any person arrested for suspicion of driving under the influence of alcohol may be directed by an officer to submit to a chemical test to determine the concentration of alcohol in that person's body.[7] If the chemical test shows a concentration above the legal limit, the driver is subject to the ALR procedures found in Neb. Rev. Stat. §§ 60-498.01 to 60-498.04 (Reissue 2004).[8]

Section 60-498.01(3) provides that when a person arrested under circumstances described in § 60-6,197(2) submits to a chemical test of blood or breath that discloses an illegal presence of alcohol and the test results are available to the arresting officer while the arrested person is still in custody, the arresting officer

> shall within ten days forward to the director a sworn report stating (a) that the person was arrested as described in subsection (2) of section 60-6,197 and the reasons for such arrest, (b) that the person was requested to submit to the required test, and (c) that the person submitted to a test, the type of test to which he or she submitted, and that such test revealed the presence of alcohol in a concentration specified in section 60-6,196 [over .08].[9]

If a motorist arrested under these circumstances requests a hearing, the issues under dispute are limited to the following:

> (A) Did the peace officer have probable cause to believe the person was operating or in the actual physical control of a motor vehicle in violation of section 60-6,196 . . . and
>
> (B) Was the person operating or in the actual physical control of a motor vehicle while having an alcohol concentration in violation of subsection (1) of section 60-6,196.[10]

Resolution of the first issue depends on the officer's reasons for arresting a motorist, while resolution of the second depends

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[6] § 60-6,197(2).

[7] § 60-6,197(3).

[8] *Id.*

[9] § 60-498.01(3).

[10] § 60-498.01(6)(c)(ii).

upon the results of the tests conducted after the arrest. Both issues require a showing of facts.

[2] The arresting officer's sworn report triggers the ALR process by establishing a prima facie basis for revocation.[11] When such a prima facie case showing is made, unless the arrested person petitions for a hearing and establishes by a preponderance of the evidence that grounds for revocation do not exist, the operator's license is automatically revoked upon the expiration of 30 days after the arrest.[12] Because of the substantial evidentiary role of the sworn report in an ALR proceeding, it "must, at a minimum," contain the information specified in § 60-498.01(3) in order to confer jurisdiction upon the director of the DMV to administratively revoke a license.[13] In this case, we focus on the reasons for the arrest, which reasons must be stated in the sworn report pursuant to § 60-498.01(3)(a).

The sworn report includes 2½ blank lines on which the officer is to state the reasons for the arrest. Here, the arresting officer's notation that Snyder was speeding explains the initial traffic stop but does not, standing alone, constitute a reason for the arrest. Although the record reflects that the officer made certain observations and conducted field sobriety tests and a preliminary breath test before the arrest, the observations and test results are not stated in the sworn report. Instead, the officer wrote only "D.U.I.," the common abbreviation for driving under the influence. While this tells us what the officer suspected when he made the arrest, it provides no factual reasons upon which his suspicion was based. As the district court correctly noted, it is a conclusion, not a reason.

Completion of the 1-page sworn report form is not an onerous task.[14] Recently in *Betterman v. Department of Motor Vehicles*,[15] we held that a notation on the sworn report that the

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[11] *Hahn v. Neth, supra* note 3.

[12] *Id.* See § 60-498.01(3).

[13] *Hahn v. Neth, supra* note 3, 270 Neb. at 171, 699 N.W.2d at 38.

[14] See *Hahn v. Neth, supra* note 3.

[15] *Betterman v. Department of Motor Vehicles*, 273 Neb. 178, 182, 728 N.W.2d 570, 578 (2007).

motorist "'displayed signs of alcohol intoxication'" constituted a reason for the arrest sufficient to confer jurisdiction on the DMV. While that provided a very general factual statement of the reasons for the arrest, it was sufficient to meet the requirement of § 60-498.01(3). In contrast, the conclusory notation "D.U.I." provides no factual reason for the officer's decision to arrest Snyder on suspicion of driving under the influence of alcohol instead of merely citing him for speeding. Because of this jurisdictional deficiency, the DMV could not consider the officer's testimony at the hearing regarding his reasons for arresting Snyder.[16]

CONCLUSION

The sworn report failed to state a reason for the officer's suspicion that Snyder was operating a motor vehicle while under the influence of alcohol, which resulted in his arrest. Because the sworn report did not include the information required by § 60-498.01(3)(a), it did not confer jurisdiction on the DMV to revoke Snyder's license. We affirm the order of the district court reversing the revocation order and directing the DMV to reinstate Snyder's driving privileges.

AFFIRMED.

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[16] See *Hahn v. Neth, supra* note 3.

HEAVICAN, C.J., dissenting.

I respectfully dissent. In the majority's view, the failing of the sworn report in this case is that the officer completing the report simply stated a conclusion rather than stating his reasons for arresting W. Ben Snyder. The majority concludes that under *Hahn v. Neth*,[1] such a defect requires a finding that the sworn report did not confer jurisdiction on the Department of Motor Vehicles (DMV) to revoke Snyder's license.

While some defects in a sworn report might be jurisdictional, the technical defects of the sworn report in this case should not operate to divest the DMV of jurisdiction. The better rule and better reading of the statutory scheme is that the information

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[1] *Hahn v. Neth*, 270 Neb. 164, 699 N.W.2d 32 (2005).

missing from the sworn report, at least as to the "reasons for such arrest"[2] at issue in this case, may be established by other means, including the testimony of the arresting officer. Indeed, such was permissible prior to this court's decision in *Hahn*. In *Morrissey v. Department of Motor Vehicles*,[3] this court held that "[i]f the sworn report is not proper, the department may, nevertheless, establish its case by other means, such as by the testimony of a witness . . . ."

There is no dispute that the information in the sworn report in this case was accurate and provided the DMV with a factual basis with which to commence revocation proceedings. Indeed, the sworn report, in compliance with § 60-498.01(3), stated that Snyder was arrested for driving while under the influence, listed reasons for Snyder's arrest, and further indicated that upon request, Snyder submitted to a chemical test which ultimately showed a blood alcohol concentration over the legal limit.

To the extent that the "reasons" provided in the sworn report might have initially been insufficient, there is no dispute that by the conclusion of the hearing, evidence had been adduced to substantiate all necessary factual findings. In particular, the officer who arrested Snyder testified to certain observations he made during the course of the traffic stop. The officer also testified that prior to Snyder's arrest, he conducted, and Snyder failed, field sobriety tests and a preliminary breath test.

The statutory scheme which provides for the revocation of an operator's license when an individual has been driving a vehicle while under the influence of alcohol is contained in § 60-498.01. The intent behind the revocation process is clear:

> Because persons who drive while under the influence of alcohol present a hazard to the health and safety of all persons using the highways, a procedure is needed for the swift and certain revocation of the operator's license of any

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[2] Neb. Rev. Stat. § 60-498.01(3)(a) (Reissue 2004).

[3] See *Morrissey v. Department of Motor Vehicles*, 264 Neb. 456, 459, 647 N.W.2d 644, 649 (2002), *disapproved, Hahn v. Neth, supra* note 1.

> person who has shown himself or herself to be a health and safety hazard . . . .[4]

Given that the Legislature has seen fit to find that "swift and certain revocation" of an operator's license is necessary when an individual drives while under the influence, I respectfully dissent from the majority's conclusion that the technical defects in this sworn report divest the DMV of jurisdiction to revoke Snyder's license. I would instead reverse the judgment of the Douglas County District Court and affirm the revocation order entered by the DMV.

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[4] § 60-498.01(1).

DAVID KAREL, SPECIAL ADMINISTRATOR OF THE ESTATE OF TINA KAREL, DECEASED, AND AUSTIN KAREL, A MINOR, BY AND THROUGH DAVID KAREL, HIS GUARDIAN AND NEXT BEST FRIEND, APPELLANTS, V. NEBRASKA HEALTH SYSTEMS, A NEBRASKA NONPROFIT CORPORATION, DOING BUSINESS AS CLARKSON WEST EMERGICARE, AND SCOTT MENOLASCINO, M.D., APPELLEES.

738 N.W.2d 831

Filed August 24, 2007. No. S-05-1311.

1. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by such rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility.
2. **Trial: Evidence: Appeal and Error.** A trial court has the discretion to determine the relevancy and admissibility of evidence, and such determinations will not be disturbed on appeal unless they constitute an abuse of that discretion.
3. **Jury Instructions: Judgments: Appeal and Error.** Whether a jury instruction given by a trial court is correct is a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
4. **Rules of Evidence: Words and Phrases.** Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.
5. **Evidence: Proof.** For evidence to be relevant, all that must be established is a rational, probative connection, however slight, between the offered evidence and a fact of consequence.

6. **Malpractice: Physician and Patient: Proof: Proximate Cause.** In a malpractice action involving professional negligence, the burden of proof is upon the plaintiff to demonstrate the generally recognized medical standard of care, that there was a deviation from that standard by the defendant, and that the deviation was the proximate cause of the plaintiff's alleged injuries.
7. **Jury Instructions: Appeal and Error.** A court does not err in failing to give an instruction if the substance of the proposed instruction is contained in those instructions actually given.
8. ____: ____. In reviewing a claim of prejudice from jury instructions given or refused, an appellate court must read the instructions together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and evidence, there is no prejudicial error.
9. **Jury Instructions: Proof: Appeal and Error.** In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.

Appeal from the District Court for Douglas County: PETER C. BATAILLON, Judge. Affirmed.

Terrence J. Salerno for appellants.

John R. Douglas, of Cassem, Tierney, Adams, Gotch & Douglas, for appellees.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

PER CURIAM.

This is an appeal from a judgment in favor of Nebraska Health Systems, doing business as Clarkson West EmergiCare (Clarkson West), and Scott Menolascino, M.D., defendants in a medical malpractice action brought by the special administrator of the estate of Tina Karel, deceased. The primary issue presented is whether the district court erred in excluding evidence of print and radio advertisements produced by Clarkson West. We conclude that it did not, and affirm the judgment.

FACTS

The operative facts in this case occurred on September 27 and 28, 2000. At that time, Clarkson West was an emergency medical facility in Omaha, Nebraska, operated as a division of Nebraska Health Systems, a Nebraska nonprofit

corporation. Menolascino worked at Clarkson West as an emergency physician. According to Menolascino, Clarkson West held itself out as a full-service emergency room, open 24 hours per day and capable of addressing life-threatening conditions.

Menolascino was on duty at Clarkson West when Karel arrived there at 7:24 p.m. on September 27, 2000. At the time of Karel's admission, a nurse recorded that Karel's chief complaints included difficulty breathing, pain and thickness in her throat, bilateral arm pain, pain in her teeth, and difficulty swallowing. Menolascino then saw Karel and obtained additional medical history. He reviewed her symptoms and determined that her throat pain was of sudden onset and that she was not experiencing back or chest pain. Menolascino performed a physical examination and listened to Karel's heart. After ordering and reviewing an electrocardiogram (EKG) and laboratory tests, Menolascino formed a diagnosis of a severe allergic reaction to medications Karel had taken, accompanied by a high degree of anxiety. He treated her with medication administered intravenously, which reduced her symptoms. Menolascino discharged her from the facility at 9:35 p.m., with instructions to stop taking the medications which he believed had triggered the allergic reaction and to see her primary physician in 2 to 3 days to have her blood pressure rechecked. Menolascino advised Karel to return to Clarkson West if she experienced further symptoms.

Karel returned to Clarkson West a few hours later at approximately 2:20 a.m. on September 28, 2000, complaining of neck pain. Menolascino again listened to Karel's heart and this time detected a murmur which had not been present at the time of his earlier examination. This caused him to suspect a potentially catastrophic condition involving her aorta. Karel was moved to a higher acuity room and, at 2:45 a.m., given a medication to reduce her blood pressure and slow down her heart rate. At 2:50 a.m., another EKG was conducted, and at 3 a.m., a chest x ray was obtained. Menolascino concluded that Karel needed to be transported to a hospital for additional tests and began making arrangements for her transfer. Menolascino testified that it was Clarkson West's policy to transfer a patient only after the patient's primary care physician was notified and the accepting

hospital confirmed that it had a bed available. Clarkson West's director at the time of Karel's admission testified that the transfer policy then in effect required the "prior approval" of the receiving facility, meaning that the receiving facility must "have the resources to take care of that patient," including a bed for the patient. An expert testified on behalf of Karel, however, that a patient in an unstable condition such as Karel should be immediately transferred to a care center of "greater level" and that such transfer would not violate "EMTALA," a federal law designed to protect patients by preventing transfers to hospitals without resources to treat the patient. He opined that the law did not require the receiving facility to have a bed if the patient being transferred was unstable and in need of greater care.

Menolascino testified that it was Clarkson West's policy not to call an ambulance squad to transfer a patient until it received notification from the accepting hospital that a bed was available. At 3:50 a.m., Clarkson West was notified by the University of Nebraska Medical Center that it had a bed, and an ambulance was called. Karel left in the ambulance at 4:25 a.m., with the records of all her tests and treatments done at Clarkson West and Menolascino's orders.

Those orders, written at 4 a.m., provided: "Admit ICU. Dx suspect Acute aortic regurgitation vs ascending aorta tear[.] Condition guarded[.] Contact cardiology for consult. Get emergent echocardiogram." Karel arrived at the University of Nebraska Medical Center's intensive care unit at 4:57 a.m. Although Menolascino had ordered an "emergent" echocardiogram, it was not until 7:10 a.m. that a cardiology consult and "transthoracic echo" were ordered by the medical center's doctors. Karel went into cardiac arrest and died at 8:59 a.m. An autopsy revealed that she died of an aortic dissection, a tearing of the inner lining of her aorta.

Karel's father, the special administrator of her estate, brought this action on behalf of the estate and Karel's minor son against Menolascino and Clarkson West. Menolascino and Clarkson West filed a pretrial motion in limine to prohibit the special administrator from presenting evidence related to print and radio advertisements produced by Clarkson West during the time period immediately prior to Karel's death. They alleged that the

advertisements were irrelevant and that even if relevant their probative value was outweighed by their prejudice. The district court sustained the motion in limine.

At trial, the special administrator presented the testimony of Martin Beerman, marketing director for Clarkson West's parent entity, as an offer of proof. Beerman testified that in 1999 and 2000, he promoted Clarkson West through an advertising campaign. The goals of the campaign were to inform the public of what services the facility offered, including that it was open 24 hours a day, 7 days a week, including holidays. The campaign used print and radio advertisements directed at women between the ages of 35 to 54 because it was understood that they made the most health care decisions for their families. The campaign emphasized the convenience of the location, the 24-hour availability, and the capability and comprehensiveness of the facility. The radio advertisements played on more than 100 occasions in both 1999 and 2000, and the print advertisements appeared in the Omaha World-Herald newspaper 12 to 16 times during each of the 2 years.

Beerman testified that the advertisements used words designed to convey the capability of the facility, the technology available at the facility, and the facility's quality of care. He testified that the advertisements represented that the doctors at the facility were capable and competent in using the technology and that if seconds mattered and when life-threatening conditions occurred, people could come to Clarkson West. During Beerman's testimony, the special administrator attempted to offer a compact disc containing the radio advertisement and printouts of the newspaper advertisement. The district court sustained the defendants' relevancy objections to the exhibits and the offer of proof.

The jury returned a verdict in favor of the defendants, and the special administrator filed this timely appeal, which we moved to our docket based on our statutory authority to regulate the caseloads of the appellate courts of this state.[1]

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[1] See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

ASSIGNMENTS OF ERROR

The special administrator assigns, restated and consolidated, that the district court erred in (1) ruling that he was not entitled to present the testimony and exhibits offered by Clarkson West's marketing director, (2) failing to instruct the jury that it could return a verdict against Clarkson West for its independent negligence, (3) instructing the jury that violations of the federal Emergency Medical Treatment and Labor Act could result in civil and criminal penalties, and (4) denying his motion for new trial.

STANDARD OF REVIEW

[1,2] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by such rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility.[2] A trial court has the discretion to determine the relevancy and admissibility of evidence, and such determinations will not be disturbed on appeal unless they constitute an abuse of that discretion.[3]

[3] Whether a jury instruction given by a trial court is correct is a question of law.[4] When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.[5]

ANALYSIS

At trial, there was conflicting expert testimony as to whether Menolascino met the applicable standard of care in his diagnosis and treatment of Karel. The jury resolved this factual dispute in favor of Menolascino. On appeal, the special administrator does not challenge the jury's finding in this regard, and we therefore do not examine this issue. This appeal instead focuses

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[2] *In re Trust of Rosenberg*, 273 Neb. 59, 727 N.W.2d 430 (2007); *Roth v. Wiese*, 271 Neb. 750, 716 N.W.2d 419 (2006).

[3] *Green Tree Fin. Servicing v. Sutton*, 264 Neb. 533, 650 N.W.2d 228 (2002); *Sharkey v. Board of Regents*, 260 Neb. 166, 615 N.W.2d 889 (2000).

[4] *Worth v. Kolbeck*, 273 Neb. 163, 728 N.W.2d 282 (2007); *Castillo v. Young*, 272 Neb. 240, 720 N.W.2d 40 (2006).

[5] *Id.*

on whether the district court committed error with respect to the special administrator's allegations of Clarkson West's independent negligence.

Marketing Evidence

[4,5] The special administrator asserts that Beerman's evidence relating to the marketing campaign conducted by Clarkson West in the years prior to Karel's death was relevant to a determination of the applicable standard of care. Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.[6] For evidence to be relevant, all that must be established is a rational, probative connection, however slight, between the offered evidence and a fact of consequence.[7]

[6] In a malpractice action involving professional negligence, the burden of proof is upon the plaintiff to demonstrate the generally recognized medical standard of care, that there was a deviation from that standard by the defendant, and that the deviation was the proximate cause of the plaintiff's alleged injuries.[8] Obviously, the marketing materials do not pertain to the specific medical care received by Karel at Clarkson West. However, we understand the special administrator to contend that the marketing evidence is relevant to the standard of care to which Clarkson West should be held. We find no indication in the record that Clarkson West claimed to be anything other than a full-service emergency room open 24 hours per day and capable of addressing life-threatening conditions; Menolascino's deposition testimony offered in evidence by the special administrator confirmed this fact. The jury was instructed that "[a] physician of an emergency room has the duty to possess and

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[6] Neb. Rev. Stat. § 27-401 (Reissue 1995). See, also, *V.C. v. Casady*, 262 Neb. 714, 634 N.W.2d 798 (2001); *Snyder v. Contemporary Obstetrics & Gyn.*, 258 Neb. 643, 605 N.W.2d 782 (2000).

[7] See, *V.C. v. Casady, supra* note 6; *Snyder v. Contemporary Obstetrics & Gyn., supra* note 6.

[8] *Snyder v. Contemporary Obstetrics & Gyn., supra* note 6; *Doe v. Zedek*, 255 Neb. 963, 587 N.W.2d 885 (1999).

use the care, skill, and knowledge ordinarily possessed and used under like circumstances by other emergency room physicians engaged in a similar practice in the same or similar community." The marketing materials would add or subtract nothing with respect to the nature of the facility for purposes of defining the applicable standard of care. And, as one court has recently noted in concluding that a hospital's marketing materials were not even discoverable, the standard of care "in a medical malpractice action is measured against local, statewide, or nationwide standards and the 'superior knowledge and skill' that a provider actually possesses, . . . not against the knowledge and skill that the provider claims to possess in its advertising."[9]

In its petition, the special administrator alleged that the marketing materials "misled . . . Karel . . . to believe that Clarkson West . . . was staffed by individuals who possessed the requisite knowledge and skill to identify serious and life-threatening conditions and to properly attend to those conditions in a timely and expedient manner." We, like the trial court, read this allegation as one for negligent misrepresentation. One of the elements of a cause of action for negligent misrepresentation is justifiable reliance on the part of the plaintiff.[10] Neither the offer of proof nor any other part of the record affords any basis for concluding that Karel relied upon or was even aware of the marketing activities undertaken by Clarkson West when she chose to seek medical care at the facility. We conclude that the district court did not abuse its discretion in sustaining the relevancy objections to the marketing materials.

Jury Instruction on Clarkson West's Negligence

The special administrator assigns error by the district court in failing to instruct the jury that it could return a verdict against Clarkson West for its negligence. The record includes a stipulation that following the instruction conference, the trial court submitted to counsel jury forms which it proposed to submit, at

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[9] *McCullough v. University of Rochester*, 17 A.D.3d 1063, 1064, 794 N.Y.S.2d 236, 237 (2005) (citation omitted).

[10] *Washington Mut. Bank v. Advanced Clearing, Inc.*, 267 Neb. 951, 679 N.W.2d 207 (2004).

which time counsel for the special administrator objected to the court's failure to include a jury form on which the jury could find solely against Clarkson West for its separate negligence. The proposed verdict form is not itself in the record. The verdict forms given to the jury permitted a verdict only for or against "the Defendants." On appeal, the special administrator argues that the failure to give the separate form to the jury was error.

The record does not reflect that the special administrator requested a specific jury instruction regarding negligence on the part of Clarkson West independent of that alleged on the part of Menolascino. In his proposed instruction, which included the statement of the case, the special administrator asserted his claim that the "defendants" were negligent in one or more of eight particulars. The statement of the case instruction given by the court utilized substantially similar introductory language, but included only five of the eight particulars. The special administrator did not make a specific objection to this instruction, but when asked if he had any proposed corrections or additions, counsel replied, "Only as were set out in the instructions that I've offered the Court." On appeal, he does not specifically argue that the jury instructions given were erroneous.

The special administrator also requested the following instruction, based upon NJI2d Civ. 6.30, the essential substance of which was given by the court:

> Professional corporation can act only through its employees or agents. A corporation is bound by the knowledge possessed by its employees and agents. It is also bound by the acts and omissions of its employees performed within the scope of their employment.
>
> At the time of treatment rendered to Tina Karel, Dr. Scott Menolascino was acting within the scope of his duties with Clarkson West Emergi[C]are. That means that if you find that Dr. Menolascino is liable to the estate of Tina Karel . . . then you must also find that Clarkson West EmergiCare and Nebraska Health Systems doing business as Clarkson West EmergiCare are also liable to the estate of Tina Karel . . . .

Thus, the jury was instructed as to the defendants' alleged negligence exactly in the manner proposed by the special

administrator, except for the deletion of three specifications of negligence in the statement of the case. The first of these involved the claim that Clarkson West "held itself out as an emergency room capable of handling sudden or life threatening injuries or illness and capable of providing CT scans on site." As we have noted above, this allegation does not relate specifically to the medical care provided to Karel, and to the extent it is asserted as a negligent misrepresentation claim, it is unsupported by the record.

[7,8] The second of the negligence specifications included in the proposed statement of the case instruction but deleted from the instruction given was a claim that defendants were negligent "[i]n failing to properly investigate, monitor and ascertain that its employees possessed the requisite knowledge, skill and training to work in an emergency room setting with patients like Tina Karel who would present with life threatening conditions." This claim presumes that Clarkson West employees did not possess such knowledge, skill, and training, and is therefore subsumed within the specific claims of negligence directed at Menolascino, the only Clarkson West employee who is specifically alleged to have been negligent in providing medical care to Karel. The third specification of negligence requested by the special administrator but not included in the court's statement of the case instruction was an alleged failure "to adequately staff the facility so that when a determination of hospitalization was made the transfer could be facilitated in an efficient and prompt manner." This is simply a restatement of the claim submitted to the jury that the defendants were negligent in "failing to provide timely transfer from Clarkson West EmergiCare" to the hospital. A court does not err in failing to give an instruction if the substance of the proposed instruction is contained in those instructions actually given.[11] In reviewing a claim of prejudice from jury instructions given or refused, an appellate court must read the instructions together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and evidence, there

[11] *Worth v. Kolbeck, supra* note 4.

is no prejudicial error.[12] Applying this standard to the record before us, we conclude that there was no prejudicial error with respect to the jury instructions and verdict forms given by the district court.

EMTALA Instruction

Instruction No. 14 given to the jury advised that the Emergency Medical Treatment and Labor Act (EMTALA),[13] a federal law regarding the transferring of patients between health care facilities, contained certain provisions. One provision was that an "appropriate transfer" occurred when the "receiving facility" "has available space" and "has agreed to accept transfer of the individual." Instruction No. 14 further provided: "A violation of [EMTALA] can result in [a] significant monetary fine. (This is not the verbatim language from this subsection, but a synopsis.)"

[9] The special administrator argues on appeal that the court erred in giving the instruction because it addressed the "civil and criminal penalties associated with violation of EMTALA" and confused the jury.[14] In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.[15] We find nothing in the language of this instruction that could have prejudiced Karel or confused the jury.

Denial of Motion for New Trial

The special administrator asserts that the district court erred in denying his motion for new trial. All of the grounds he asserts as error in this appeal were asserted in support of his motion for new trial. For the reasons discussed herein, the district court did not err in denying the motion for new trial.

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[12] *Orduna v. Total Constr. Servs.,* 271 Neb. 557, 713 N.W.2d 471 (2006).

[13] 42 U.S.C. § 1395dd (2000 & Supp. IV 2004).

[14] Brief for appellants at 16.

[15] *Orduna v. Total Constr. Servs., supra* note 12; *Shipler v. General Motors Corp.*, 271 Neb. 194, 710 N.W.2d 807 (2006).

CONCLUSION

The special administrator's assignments of error are unsupported by the record and the applicable law. The jury verdict is affirmed.

AFFIRMED.

KEVIN M. JONES AND AMERICAN FAMILY MUTUAL INSURANCE COMPANY, A WISCONSIN CORPORATION, APPELLANTS, V. SHELTER MUTUAL INSURANCE COMPANIES, APPELLEE.

738 N.W.2d 840

Filed August 24, 2007. No. S-06-310.

1. **Insurance: Contracts: Appeal and Error.** The interpretation of an insurance policy is a question of law, in connection with which an appellate court has an obligation to reach its own conclusions independently of the determination made by the trial court.
2. **Statutes: Appeal and Error.** Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.
3. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
4. **Summary Judgment: Final Orders: Appeal and Error.** When adverse parties have each moved for summary judgment and the trial court has sustained one of the motions, the reviewing court obtains jurisdiction over both motions and may determine the controversy which is the subject of those motions or make an order specifying the facts which appear without substantial controversy and direct such further proceedings as the court deems just.
5. **Insurance: Contracts.** An insurance policy is a contract between an insurance company and an insured, and as such, the insurance company has the right to limit its liability by including limitations in the policy definitions. If the definitions in the policy are clearly stated and unambiguous, the insurance company is entitled to have such terms enforced.

Appeal from the District Court for Douglas County: GREGORY M. SCHATZ, Judge. Affirmed.

Eugene L. Hillman and Patricia McCormack, of Hillman, Forman, Nelsen, Childers & McCormack, for appellants.

Susan Kubert Sapp and Laura R. Hegge, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for appellee.

HEAVICAN, C.J., CONNOLLY, GERRARD, STEPHAN, and MILLER-LERMAN, JJ.

STEPHAN, J.

This appeal requires us to determine whether an insurer's definition of "use" of a motor vehicle as "operation and maintenance" violates Nebraska public policy applicable to uninsured motorist insurance. We conclude that it does not.

FACTS

This case was tried to the district court on stipulated facts. On December 30, 2003, Kevin M. Jones was a front seat passenger in an automobile driven by Amanda Stastny. The automobile was struck by an uninsured motorist in Omaha, Douglas County, Nebraska. The uninsured motorist was legally liable for the accident.

At the time of the accident, Shelter Mutual Insurance Companies (Shelter) had in effect a policy of automobile insurance issued to Stastny which insured her automobile. The policy included uninsured motorist coverage. On the same date, American Family Mutual Insurance Company (American Family) had in force an automobile liability insurance policy issued to Jones' parents, under which Jones was an additional insured for purposes of uninsured motorist coverage. Both Stastny and Jones made claims for uninsured motorist benefits under the Shelter policy, and Jones made a claim for uninsured motorist benefits under the American Family policy. Shelter paid $25,000 in benefits to Stastny, but denied benefits to Jones. American Family paid Jones $60,000 of its $100,000 policy limit, and he executed a release and assignment of any rights he had against Shelter in favor of American Family.

Jones and American Family brought this action to recover uninsured motorist benefits under the Shelter policy. The policy provided for uninsured motorist benefits in the amount of $50,000 per person or $100,000 per accident. It contained a provision limiting uninsured benefits for non-named insureds to the minimum limits required by law, which in Nebraska is $25,000 per person.[1] The Shelter policy provided in relevant part:

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[1] See Neb. Rev. Stat. § 44-6408(1)(a) (Reissue 2004).

PART I — AUTO LIABILITY

COVERAGE A — **BODILY INJURY** LIABILITY;
COVERAGE B — **PROPERTY DAMAGE** LIABILITY

ADDITIONAL DEFINITIONS USED IN PART I

As used in this Part, **insured** means:

(1) **You**, with respect to **your ownership** or **use** of the **described auto** and **your use** of a **non-owned auto**;

(2) any **relative**, with respect to his or her **use** of the **described auto** or a **non-owned auto**;

(3) any **individual** who is:

(a) related to **you** by blood, marriage, or adoption, who is primarily a resident of, and actually living in, **your** household, including **your** unmarried and unemancipated child away at school; or

(b) a foster child in **your** legal custody for more than ninety consecutive days immediately prior to the **accident**; but only with respect to that **individual's use** of the **described auto**;

(4) any **individual** listed in the Declarations as an "additional listed insured," but only with respect to that **individual's use** of the **described auto**; and

(5) any **individual** who has **permission** or **general consent** to **use** the **described auto**. However, the limits of **our** liability for **individuals** who become **insureds** solely because of this subparagraph, will be the minimum limits of liability insurance coverage specified by the **financial responsibility law** applicable to the **accident**, regardless of the limits stated in the Declarations.

. . . .

PART IV — UNINSURED MOTORISTS

COVERAGE E — UNINSURED MOTORISTS

ADDITIONAL DEFINITIONS USED IN PART IV

As used in this Part:

. . . .

(2) **Insured** means:

(a) **You**;

(b) any **relative**;

(c) any **individual** who is:

(i) related to **you** by blood, marriage, or adoption, who is primarily a resident of, and actually living in, **your** household, including **your** unmarried and unemancipated child away at school; or

(ii) a foster child in **your** legal custody for more than ninety consecutive days immediately prior to the **accident**; but only when that **individual** is **occupying** the **described auto**;

(d) any **individual** listed in the Declarations as an "additional listed insured," but only when that **individual** is **occupying** the **described auto**; and

(e) any **individual** who has **permission** or **general consent** to **use** the **described auto** but only when that **individual** is **using** the **described auto**. However, the limit of **our** liability for **individuals** who become **insureds** solely because of this subparagraph, will be the minimum limits of uninsured motorist insurance coverage specified by the **uninsured motorist law** or **financial responsibility law** applicable to the **accident**, regardless of the limit stated in the Declarations.

The "**DEFINITIONS**" section of the Shelter policy, applicable to all sections of the policy, defined "**Use**" to mean "**operation** and **maintenance**," "**Occupy**" to mean "being in physical contact with a vehicle while in it, getting into it, or getting out of it," and "**Operate**" to mean "physically controlling, having physically controlled, or attempting to physically control, the movements of a vehicle." It is undisputed that Jones was not a relative of Stastny and was not a named insured or an additional insured on the Shelter policy. Jones also was not the operator of the automobile at the time of the accident, nor was he performing maintenance on the vehicle.

American Family and Shelter filed motions for summary judgment. The district court granted Shelter's motion, finding that Jones was not an insured under the Shelter policy and therefore was not entitled to uninsured motorist benefits. The district court also determined that notwithstanding this fact, the American Family policy was Jones' primary source of uninsured motorist benefits and that he had not exhausted this

coverage prior to asserting his claim against Shelter. The court concluded that "the Shelter . . . policy denying uninsured motorist coverage to Jones under the circumstances is not contrary to Nebraska law."

Jones and American Family (hereinafter collectively appellants) filed this timely appeal. We granted their petition to bypass the Court of Appeals.[2]

ASSIGNMENTS OF ERROR

Appellants assign, restated and consolidated, that the district court erred in (1) failing to find that language in the Shelter policy violates Nebraska public policy and the Nebraska uninsured motorist statutes, (2) failing to find that the Shelter policy provides uninsured motorist coverage for Jones, and (3) finding that American Family was the primary uninsured motorist carrier.

STANDARD OF REVIEW

[1,2] The interpretation of an insurance policy is a question of law, in connection with which an appellate court has an obligation to reach its own conclusions independently of the determination made by the trial court.[3] Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.[4]

[3,4] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.[5] When adverse parties have each moved for summary judgment and the trial court has sustained one of the motions, the reviewing court obtains jurisdiction over both motions and may determine the controversy which is the subject of those

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[2] See Neb. Rev. Stat. § 24-1106(2) (Reissue 1995).

[3] *Lovette v. Stonebridge Life Ins. Co.*, 272 Neb. 1, 716 N.W.2d 743 (2006); *Dutton-Lainson Co. v. Continental Ins. Co.*, 271 Neb. 810, 716 N.W.2d 87 (2006).

[4] *Livengood v. Nebraska State Patrol Ret. Sys.*, 273 Neb. 247, 729 N.W.2d 55 (2007).

[5] *Johnson v. Knox Cty. Partnership*, 273 Neb. 123, 728 N.W.2d 101 (2007).

motions or make an order specifying the facts which appear without substantial controversy and direct such further proceedings as the court deems just.[6]

ANALYSIS

We begin from a point of consensus. The district court determined that Jones was not an "insured" as defined in the Shelter policy. Appellants and Shelter agree with that reading of the policy. The question presented is whether the Shelter policy provision defining "use" to include only "operation and maintenance" of the vehicle is contrary to the public policy embodied in the Uninsured and Underinsured Motorist Insurance Coverage Act,[7] the purpose of which is "to give the same protection to a person injured by an uninsured or underinsured motorist as the person would have if he or she had been injured in an accident caused by an automobile covered by a standard liability policy."[8] The provisions of the act are to be liberally construed to accomplish such purpose.[9]

The act requires in relevant part:

> No policy insuring against liability imposed by law for bodily injury . . . suffered by a natural person arising out of the *ownership, operation, maintenance, or use* of a motor vehicle within the United States . . . shall be delivered, issued for delivery, or renewed with respect to any motor vehicle principally garaged in this state unless coverage is provided for the protection of *persons insured* who are legally entitled to recover compensatory damages for bodily injury . . . from (a) the owner or operator of an uninsured motor vehicle . . . .[10]

Appellants contend that this statute "specifies the circumstances under which uninsured coverage must be provided" and that

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[6] *Id.*

[7] Neb. Rev. Stat. §§ 44-6401 to 44-6414 (Reissue 2004).

[8] See *Allied Mut. Ins. Co. v. Action Elec. Co.*, 256 Neb. 691, 697, 593 N.W.2d 275, 279 (1999).

[9] *Id.*

[10] § 44-6408(1) (emphasis supplied).

those circumstances include "when bodily injury results from the 'ownership, operation, maintenance, or use of a motor vehicle.'"[11] They argue that the statute clearly requires that "ownership," "operation," "maintenance," and "use" must have separate definitions and meaning and that Shelter's policy fails to carry out this statutory intent because it equates "use" with "operation and maintenance" in its definitions.[12]

Our case law recognizes that in the context of motor vehicle insurance, the term "use" may have a broader meaning than "operation," especially when applied to passengers.[13] However, the fact that we have held in past cases that a passenger is "using" a motor vehicle for purposes of a motor vehicle insurance policy is not determinative here, because there is no indication in those cases that the policies included the restrictive definition of "use" found in the Shelter policy.[14]

In *Allied Mut. Ins. Co.*,[15] we held that the phrase "persons insured" as used in § 44-6408 means "those persons insured under the liability provisions of a motor vehicle policy." Because the liability coverage of the policy at issue in that case insured persons "using" the vehicle, we held that the insurer could not limit underinsured motorist coverage "to the smaller class of persons 'occupying' the vehicle."[16]

[5] Unlike the policy at issue in *Allied Mut. Ins. Co.*, the Shelter policy before us defines "insured" in substantially the same way under its liability and uninsured motorist coverages. Although both provide coverage for persons using the vehicle

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[11] Brief for appellants at 15.

[12] See *Zach v. Nebraska State Patrol*, 273 Neb. 1, 727 N.W.2d 206 (2007) (holding court must attempt to give effect to all parts of statute, and no word, clause, or sentence will be rejected as superfluous or meaningless).

[13] See, *Allied Mut. Ins. Co. v. Action Elec. Co., supra* note 8; *National Union Fire Ins. Co. v. Bruecks*, 179 Neb. 642, 139 N.W.2d 821 (1966); *Metcalf v. Hartford Acc. & Ind. Co.*, 176 Neb. 468, 126 N.W.2d 471 (1964).

[14] See *id.*

[15] *Allied Mut. Ins. Co. v. Action Elec. Co., supra* note 8, 256 Neb. at 699, 593 N.W.2d at 280.

[16] *Id.*

with the permission of the named insured, "use" is narrowly defined to include only "operation and maintenance." Thus, a passenger is not an "insured," as defined by the policy, under either its liability or its uninsured motorist insurance provisions. An insurance policy is a contract between an insurance company and an insured, and as such, the insurance company has the right to limit its liability by including limitations in the policy definitions.[17] If the definitions in the policy are clearly stated and unambiguous, the insurance company is entitled to have such terms enforced.[18]

Appellants argue that Shelter's definition is contrary to the language of § 44-6408. Clearly, however, § 44-6408 relates specifically to uninsured and underinsured motorist coverage and does not dictate who must be insured under the *liability* coverage of a policy. The phrase "ownership, operation, maintenance, or use" in § 44-6408 simply describes the type of liability coverage a policy *may* offer. As we held in *Allied Mut. Ins. Co.*, the statute then requires that any person or class of persons insured under that liability coverage must also be insured under the uninsured motorist coverage. Here, Shelter has chosen to limit both its liability and uninsured coverage for a person "using" the vehicle with the consent of the insured to those circumstances in which the use involves the operation and maintenance of the vehicle. Such limitation does not violate the public policy expressed in § 44-6408.

As an alternative basis for its ruling in favor of Shelter, the district court determined that the American Family policy was Jones' "primary source of benefits under the circumstances" and that Jones' failure to exhaust such benefits barred any claim against Shelter.

Section 44-6411 provides:

> (1) In the event an insured *is entitled to uninsured or underinsured motorist coverage under more than one policy of motor vehicle liability insurance*, the maximum

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[17] *Hillabrand v. American Fam. Mut. Ins. Co.*, 271 Neb. 585, 713 N.W.2d 494 (2006).

[18] *Id.*

> amount an insured may recover shall not exceed the highest limit of any one such policy.
>
> (2) In the event of bodily injury, sickness, disease, or death of an insured while occupying a motor vehicle not owned by the insured, payment shall be made in the following order of priority, subject to the limitations in subsection (1) of this section: (a) The uninsured or underinsured motorist coverage on the occupied motor vehicle is primary; and (b) if such primary coverage is exhausted, other uninsured or underinsured motorist coverage available to the insured is excess.
>
> (3) *When multiple policies apply, payment shall be made in the following order of priority*, subject to the limit of liability for each applicable policy:
>
> (a) A policy covering a motor vehicle occupied by the injured person at the time of the accident;
>
> . . . .
>
> (c) A policy covering a motor vehicle not involved in the accident with respect to which the injured person is an insured.

(Emphasis supplied.) Jones was not an insured under the Shelter policy insuring the vehicle in which he was an occupant at the time of his injury. Accordingly, under § 44-6411, he was not "entitled" to benefits under more than one policy, nor do "multiple policies" apply to him. The district court correctly found that the priority-of-payment provisions in § 44-6411 were not applicable and that the American Family policy is the primary policy under the circumstances of this case.

CONCLUSION

For the reasons discussed, Shelter's definition of "use" to include only "operation and maintenance" does not violate the public policy embodied in § 44-6408. Because Jones was not an insured under the uninsured motorist coverage afforded by the Shelter policy, the priority-of-payment provisions in § 44-6411 are inapplicable to him. We affirm the judgment of the district court.

AFFIRMED.

WRIGHT and MCCORMACK, JJ., not participating.

GERRARD, J., concurring.

I agree with the majority opinion that Shelter's definition of "use" as "operation and maintenance" does not violate existing Nebraska public policy applicable to uninsured motorist insurance. While Shelter's definition of use does not expressly violate the current public policy (such as it is) embodied in Neb. Rev. Stat. § 44-6408 (Reissue 2004), Shelter's insurance policy has exposed a loophole in Nebraska law that, until closed by the Legislature, will leave many Nebraskans at the mercy of uninsured motorists.

The problem is created by Nebraska's omnibus statute for motor vehicle insurance, which does not provide the same protection that is provided to motorists in nearly every other state. Like most states, Nebraska requires motor vehicles to be covered by some form of financial security, usually liability insurance.[1] And like most states, Nebraska has a statute specifying the coverage necessary to meet that requirement.[2]

But in most states, the omnibus statute sets minimum standards for both the amount of coverage and the scope of that coverage.[3] In other words, the policy must provide coverage up to a monetary limit, must cover a certain range of injuries, and most pertinent to this case, must include particular people as "insured."[4] In nearly every state, an omnibus statute requires a policy to insure any motor vehicle owned by the insured *and* any other person using that vehicle with permission of the insured against loss from liability for damages "arising out of the ownership, maintenance, or use" of the vehicle.[5] In a few other states,

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[1] See Neb. Rev. Stat. § 60-387 (Cum. Supp. 2006).

[2] See Neb. Rev. Stat. § 60-310 (Cum. Supp. 2006).

[3] See, generally, 8 Lee R. Russ & Thomas F. Segalla, Couch on Insurance 3d § 111:22 (2004); 1 Irvin E. Schermer and William J. Schermer, Automobile Liability Insurance § 3:9 (4th ed. 2004).

[4] See *id*.

[5] See *id*. See, e.g., Alaska Stat. § 28.22.101 (2004); Ariz. Rev. Stat. Ann. § 28-4009 (2004); Cal. Ins. Code § 11580.1 (West Cum. Supp. 2007); Colo. Rev. Stat. Ann. § 10-4-620 (West 2006); Conn. Gen. Stat. Ann. § 38a-335 (West 2000); Del. Code Ann. tit. 21, § 2118(a) (2005); Fla. Stat. Ann. § 627.736(1) (West Cum. Supp. 2007); Haw. Rev. Stat. § 431:10C-301(b)

statutes more specifically address whether liability coverage must extend to passengers and who must be provided with uninsured motorist protection.[6] Florida, for example, has specified in commendable detail the coverage that compulsory automobile liability insurance should provide, including coverage for passengers and permissive users and the particular benefits to which an insured is minimally entitled.[7]

By contrast, Nebraska's omnibus statute, § 60-310, only establishes monetary limits for a policy. It does not require a motorist's liability insurance to cover any particular range of persons or injuries. Nebraska's insurance requirement can be satisfied by evidence of an "automobile liability policy," which only requires insurance "protecting other persons from

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(2005); Idaho Code Ann. § 49-1212 (Cum. Supp. 2007); Ind. Code Ann. § 9-25-2-3 (LexisNexis 2004); Iowa Code Ann. § 321.1(24B) (West Cum. Supp. 2007); Kan. Stat. Ann. § 40-3107 (2001); Ky. Rev. Stat. Ann. § 304.39-020 (LexisNexis 2006); La. Rev. Stat. Ann. § 32:900(B)(2) (Cum. Supp. 2007); Me. Rev. Stat. Ann. tit. 29-A, § 1605 (1996 & Cum. Supp. 2004); Mass. Gen. Laws Ann. ch. 90, § 34A (West 2001); Mich. Comp. Laws Ann. § 500.3101 et seq. (West 2002 & Cum. Supp. 2007); Minn. Stat. Ann. § 65B.49 (West Cum. Supp. 2007); Miss. Code Ann. § 63-15-3(j) (Cum. Supp. 2006); Mo. Ann. Stat. § 303.190 (West 2003); Mont. Code Ann. § 61-6-103 (2005); Nev. Rev. Stat. § 485.3091 (2005); N.H. Rev. Stat. Ann. § 259:61 (Cum. Supp. 2006); N.J. Stat. Ann. § 39:6B-1 (West Cum. Supp. 2007); N.M. Stat. § 66-5-205.3 (2006); N.Y. Veh. & Traf. Law § 311 (McKinney 2005); N.C. Gen. Stat. § 20-279.21 (2005); N.D. Cent. Code § 39-16.1-11 (Supp. 2007); Ohio Rev. Code Ann. § 4509.01(K) (LexisNexis 2003); Okla. Stat. Ann. tit. 47, § 7-600 (West 2007); Or. Rev. Stat. § 806.080 (2005); 75 Pa. Cons. Stat. Ann. § 1702 (West 2006); R.I. Gen. Laws § 31-47-2 (2002); S.C. Code Ann. § 38-77-140 et seq. (Cum. Supp. 2006); S.D. Codified Laws § 32-35-70 (2004); Tenn. Code Ann. §§ 55-12-102 and 55-12-122 (2004); Tex. Transp. Code Ann. § 601.071 et seq. (Vernon 1999); Utah Code Ann. §§ 31A-22-303 and 31A-22-304 (2005); Va. Code Ann. § 46.2-472 (2005); W. Va. Code Ann. § 17D-4-2 (LexisNexis 2004); Wyo. Stat. Ann. § 31-9-405 (2007).

[6] See, e.g., Ga. Code Ann. § 33-7-11 (Supp. 2006) (uninsured motorist coverage for permissive users); Md. Code Ann. Ins. § 19-505 (LexisNexis Supp. 2006); Md. Code Ann. Transp. § 17-103 (LexisNexis 2006) (specifying coverage for permissive users); Wis. Stat. Ann. § 632.32 (West 2004) (uninsured motorist coverage for permissive users; no passenger exclusions).

[7] See Fla. Stat. Ann. § 627.736(1).

damages for liability on account of accidents" in the amount of $25,000 or $50,000, depending on the injury.[8] Because Nebraska's peculiar omnibus statute does not specify the scope of insurance coverage Nebraska motorists must carry, Shelter was left free to define "use" in a way that is inconsistent with the well-established meaning of the word and in a way that would not have met the minimum standards required nearly everywhere else.

Nebraska law does require that policies certified as "proof of financial responsibility" insure the named insured and permissive users "against loss from the liability imposed by law for damages arising out of the ownership, maintenance, or use of such motor vehicle."[9] But that statute only extends to policies intended to provide the "proof of financial responsibility" that must be filed by persons subject to the Motor Vehicle Safety Responsibility Act,[10] whose licenses have been suspended or revoked for reasons such as an unsecured accident, an unsatisfied judgment, or a criminal conviction. It does not apply to policies not certified for that purpose,[11] and Nebraska's compulsory financial responsibility law can be satisfied by *either* "proof of financial responsibility" *or* the lesser showing of "evidence of insurance" explained above.[12] When the Legislature passed 1995 Neb. Laws, L.B. 37, enacting the predecessor to § 60-310, it may have intended to require the same insurance coverage for all motorists. But the statutes as currently written do not accomplish that.

It is clear from the record in this case that Shelter's policy was intended to comply with Nebraska's compulsory insurance statutes. If Nebraska had an omnibus statute imposing the

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[8] See § 60-310.

[9] See Neb. Rev. Stat. § 60-534 (Reissue 2004). See, also, Neb. Rev. Stat. § 60-346 (Cum. Supp. 2006).

[10] Neb. Rev. Stat. ch. 60, art. 5 (Reissue 2004 & Cum. Supp. 2006).

[11] See, *State Farm Mut. Auto. Ins. Co. v. Hildebrand*, 243 Neb. 743, 502 N.W.2d 469 (1993); *State Farm Mut. Auto. Ins. Co. v. Pierce*, 182 Neb. 805, 157 N.W.2d 399 (1968).

[12] See § 60-387.

requirements found to be minimally acceptable in nearly every other state, Jones, as a passenger, would have been engaged in permissive "use" of the vehicle within the well-established meaning of the word and would have been an "insured" for purposes of uninsured motorist coverage.[13] The result in this case is a direct consequence of that defect in Nebraska's motor vehicle liability insurance statutes.

Fourteen years ago, several members of this court characterized Nebraska statutes on liability insurance coverage for motor vehicles as "a series of intermittent skin grafts on an amorphous body of law with the anatomical deficiency of no backbone," concluding that the deficiencies in the statutes "produc[ed] a public misperception and the mirage of mandatory insurance coverage."[14] While the situation now is not as unfortunate as it was then, unless there is further improvement, Nebraska's omnibus statute cannot achieve its remedial purpose of protecting the public.[15] And the Uninsured and Underinsured Motorist Insurance Coverage Act[16] will not serve its purpose of protecting the public from negligent, financially irresponsible motorists[17] so long as innocent passengers can be effectively excluded from its benefits.

It is a fact of life in the insurance industry that consumers have little if any leverage when purchasing insurance policies[18] and that consumers unaware of or unschooled in the vagaries of insurance contracts may be misled into believing they have purchased coverage when in reality they have not.[19] It is for

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[13] See *Protective Fire & Cas. Co. v. Cornelius*, 176 Neb. 75, 125 N.W.2d 179 (1963).

[14] *Hildebrand, supra* note 11, 243 Neb. at 757, 502 N.W.2d at 477 (Shanahan, J., concurring; White, Fahrnbruch, and Lanphier, JJ., join).

[15] See *Cornelius, supra* note 13.

[16] Neb. Rev. Stat. § 44-6401 et seq. (Reissue 2004).

[17] *Continental Western Ins. Co. v. Conn*, 262 Neb. 147, 629 N.W.2d 494 (2001).

[18] See *Hildebrand, supra* note 11 (Shanahan, J., concurring).

[19] See *Allied Mut. Ins. Co. v. Action Elec. Co.*, 256 Neb. 691, 593 N.W.2d 275 (1999).

these reasons that the legislatures in nearly every state have enacted statutory schemes that serve the purpose of providing compensation for innocent victims of automobile accidents and protecting named insureds, permittees, and injured persons.[20] Nebraska's Legislature would be well advised to follow their example. For the moment, however, I am constrained to concur in the properly reasoned judgment of the court.

HEAVICAN, C.J., joins in this concurrence.

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[20] See 8 Russ & Segalla, *supra* note 3.

IN RE TRUST CREATED BY HENRY S. HANSEN, DECEASED. WELLS FARGO BANK, N.A., TRUSTEE OF THE HENRY S. HANSEN TRUST, ET AL., APPELLEES, V. ESTATE OF RUTH ELAINE MANSFIELD, APPELLANT.

739 N.W.2d 170

Filed August 31, 2007. No. S-06-002.

1. **Trusts: Equity: Appeal and Error.** Appeals involving the administration of a trust are equity matters and are reviewable in an appellate court de novo on the record.
2. **Decedents' Estates: Appeal and Error.** In the absence of an equity question, an appellate court, reviewing probate matters, examines for error appearing on the record made in the county court.
3. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
4. ____: ____. In instances when an appellate court is required to review cases for error appearing on the record, questions of law are nonetheless reviewed de novo on the record.
5. **Trial: Pleadings: Pretrial Procedure.** A motion for judgment on the pleadings is properly granted when it appears from the pleadings that only questions of law are presented.
6. **Trusts: Courts: Jurisdiction.** The act of registering a trust gives the county court jurisdiction over the interests of all notified beneficiaries to decide issues related to any matter involving the trust's administration, including a request for instructions or an action to declare rights.
7. **Decedents' Estates: Courts: Jurisdiction: Equity.** In exercising probate jurisdiction, a court may use equity power and principles to dispose of a matter within the court's probate jurisdiction.
8. **Trusts.** Neb. Rev. Stat. § 30-3812 (Cum. Supp. 2006) does not limit to trustees the right to seek instructions from the court.

9. **Trusts: Intent.** The extent of the beneficiary's interest in a trust depends upon the discretionary power that the settlor intended to grant the trustee.
10. ____: ____. When the parties do not claim that the terms are unclear or contrary to the settlor's actual intent, the interpretation of a trust's terms is a question of law.
11. **Decedents' Estates: Trusts.** A trust beneficiary's estate can seek to enforce the beneficiary's interests in the trust to the extent that the beneficiary could have enforced his or her interests immediately before death.
12. **Trial: Evidence.** A county court's order is not supported by competent evidence when it fails to hold an evidentiary hearing on factual issues.
13. **Trial: Pleadings.** Neither the parties' arguments nor the court's discussions with parties can substitute for providing the parties an opportunity to support or refute disputed factual issues raised by the pleadings.
14. **Appeal and Error.** An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.

Appeal from the County Court for Douglas County: EDNA R. ATKINS, Judge. Reversed and vacated, and cause remanded with directions.

Michael D. McClellan and William E. Gast, of Gast & McClellan, for appellant.

M.H. Weinberg, of Weinberg & Weinberg, P.C., for appellees Stephen S. Scholder and Paula Sue Baird Kaminski.

William R. Johnson, of Lamson, Dugan & Murray, L.L.P., and Raymond E. Walden, of Walden Law Office, for appellee Wells Fargo Bank, N.A.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

HEAVICAN, C.J.

NATURE OF CASE

The county court determined, without an evidentiary hearing, that after the beneficiary of a discretionary support trust had died, the trustee could not pay claims for the beneficiary's health care expenses because the purpose of the trust had ceased to exist. We conclude that a decedent beneficiary's estate can seek to enforce the beneficiary's interests in a trust to the same extent that the beneficiary could have enforced his or her interests immediately before death. We further conclude that an evidentiary hearing was required before the county court could

determine whether the trustee abused its discretion or had a duty to make support payments. Accordingly, we reverse and vacate the county court's order and remand the cause with directions to hold an evidentiary hearing.

BACKGROUND

Trust Provisions

In June 1979, Henry S. Hansen executed this inter vivos trust. The trust provided for the care, support, and maintenance of Hansen during his lifetime. Upon Hansen's death, the residue of his estate was to be held in trust for the lifetime benefit of his daughters. Article I provided: "The Trust shall continue for the duration of the lives of Grantor's two daughters, MILDRED B. BONACCI and RUTH E. MANSFIELD, and until the death of the survivor of them." Article II provided in part:

> The Trustee shall make two divisions of the corpus of the Trust, one for MILDRED B. BONACCI and one for RUTH E. MANSFIELD. During the lifetime of each of said daughters, the Trustee shall pay the net income of the respective divisions of the Trust to said daughters in installments not less frequently than quarterly. In addition, should either of said daughters, by reason of accident or illness require funds in excess of the net income of the Trust, then the Trustee shall make such payments from such daughter's division of the principal as it may deem proper for the benefit of such daughter.

Upon the surviving daughter's death, article III instructed the trustee to pay Hansen's four grandchildren $5,000 each and to distribute the remaining funds to two of those grandchildren, Paula Sue Baird Kaminski and Stephen S. Scholder.

Remainder Beneficiaries' Filing After Ruth's Death

Hansen died in October 1979. In May 2005, the trustee, Wells Fargo Bank, N.A., registered Hansen's trust with the county court, with notice to interested parties. On June 6, 2005, the remainder beneficiaries, Kaminski and Scholder, filed an action to declare rights with the county court, alleging that Mildred B. Bonacci had died on June 30, 1986, and that Ruth Elaine Mansfield (Ruth) had died on January 8, 2005. They alleged that

on January 19, a person named "Jane Falion" had filed a claim with the trustee requesting payment for Ruth's medical expenses and that the trustee had denied the claim on March 10. The record does not reflect whether Falion is Ruth's personal representative. Two letters, one from Falion and another from the trustee, were attached as exhibits, along with invoices for Ruth's expenses. In the trustee's letter, a trust officer stated that the trustee did not believe it could make a distribution after Ruth's death and that "it is our understanding that [Ruth's] Estate has sufficient assets to pay those expenses."

Trustee Seeks Court Directive

On June 7, 2005, the trustee filed a petition for a trust administration proceeding. The same letters were attached as exhibits. The trustee alleged that it had denied the claim "until such time as [it] obtained credible information regarding the composition of [Ruth's] probate estate" and that the estate had failed to provide this information upon request. The trustee requested that the court interpret the trust and direct how it should distribute the assets.

Ruth's Estate Sues Trustee

In August, Ruth's estate filed an action for breach of the trust and to compel the trustee to comply with its duties. Ruth's estate alleged that beginning in 2001, Ruth's physical and mental health had deteriorated and that her relatives and representatives "inquired to the Trustee about the terms of the Trust and, in particular, the sections of the Trust [dealing with payments to the beneficiaries for illness and distribution of the estate]." It alleged that the trustee knew or should have known of Ruth's medical condition and needs, but did not exercise any diligence in inquiring about her support or distribute any funds for her support. The estate did not allege that anyone on Ruth's behalf asked the trustee for support payments before Ruth's death.

The court set an evidentiary hearing on the estate's action against the trustee for August 23, 2005. Before the hearing, Ruth's estate deposed the trust officer who had written the trustee's letter, and the remainder beneficiaries served additional discovery on the trustee. On August 11, the trustee moved to

consolidate the actions and continue the evidentiary hearing. The court also set a hearing on those motions for August 23, to be conducted before the evidentiary hearing.

Remainder Beneficiaries Seek Court Directive

In addition to their original action to declare rights, on August 15, 2005, the remainder beneficiaries also moved for a declaration of rights. In their motion, they asked the county court to decide three issues as a matter of law in order to guide the parties in resolving their dispute. The remainder beneficiaries asked, restated: (1) Does the court or trustee determine the propriety of distributions under the trust? (2) Can the trustee deny payments for billings related to Ruth's care, accrued before her death but not submitted until after her death? (3) If billings submitted after Ruth's death may be paid, what standards should the trustee use in determining whether to pay the expenses? The remainder beneficiaries further stated: "The factual development of the case can still proceed to an ultimate determination of rights based upon the Court's legal guidance . . . ."

County Court Hearings

On August 23, 2005, just before the hearing on the trustee's motions to continue and to consolidate the actions, the county court judge had a conversation with counsel for the remainder beneficiaries. Counsel stated that the trustee and the remainder beneficiaries would argue that the judge's powers "were done" after Ruth's death and that the evidentiary hearing may not be necessary. During the hearing, the court stated that it could not conduct the evidentiary hearing because another case was taking up the afternoon.

Counsel for the remainder beneficiaries stated that the remainder beneficiaries and the trustee were asking for a ruling on whether postdeath payments could be made if there were no bills submitted before Ruth's death and that if the court concluded the trust was unambiguous, it could decide that issue as a matter of law. They argued that if the court concluded the payments could be made, then Ruth's estate could submit evidence.

Ruth's estate agreed with the remainder beneficiaries that the threshold issue was whether the trustee could make the

payments, but argued that there was evidence the court must hear before making that determination. In addition, Ruth's estate argued that there would be evidence that the trustee was aware of Ruth's circumstances before her death and that there was a request for support payments prior to her death. The court stated it would not make a determination or receive evidence that day and continued the hearing.

Various discovery actions and motions to compel Ruth's estate to produce documents were filed during the fall of 2005. In November, the court sustained the remainder beneficiaries' motion to compel discovery and gave Ruth's estate 60 days to respond. On December 23, however, the court issued a written order, concluding that an evidentiary hearing was unnecessary and deciding the dispute.

County Court's Order

The county court specifically found:

> Ruth . . . was [a] successful business woman and had substantial income at her disposal, exclusive of the Trust income. As she advanced in age, Ruth . . . became ill and infirm. Medical bills and last illness expenses were incurred. On January 8, 2005, Ruth . . . died. Thereafter, on January 19, 2005, for the first time, representatives of Ruth['s] estate made a written request to the Trustee for payment of these expenses from the Trust funds.

The court determined that the Hansen trust was a discretionary support trust because the support payments did not become mandatory until "the Trustee in [its] discretion determines that the beneficiary requires funds in excess of the Trust income." The court ultimately concluded that the trustee had properly denied payment of the medical bills because the purpose of the trust had ended with Ruth's death and the payments would only benefit Ruth's creditors and heirs.

Ruth's estate timely appealed.

ASSIGNMENTS OF ERROR

Ruth's estate assigns that the county court erred in (1) rendering a factual and legal decision without the benefit of an evidentiary hearing, (2) determining that Ruth's interests in the

trust ended with her death, (3) misapplying the law applicable to determining the purposes of a trust, (4) finding that the trustee had satisfied its duties under the trust, and (5) entertaining communications with counsel for the remainder beneficiaries outside the presence of the other parties.

STANDARD OF REVIEW

[1-4] Appeals involving the administration of a trust are equity matters and are reviewable in an appellate court de novo on the record.[1] In the absence of an equity question, an appellate court, reviewing probate matters, examines for error appearing on the record made in the county court.[2] When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.[3] In instances when an appellate court is required to review cases for error appearing on the record, questions of law are nonetheless reviewed de novo on the record.[4]

ANALYSIS

Ruth's estate contends the county court could not determine the terms of the trust or whether the trustee had complied with its duties under the trust without first conducting an evidentiary hearing. The remainder beneficiaries argue the court could decide this issue as a matter of law because a trustee has no discretion to make support payments after a beneficiary's death. They also characterize the court's order as a default judgment and their August 15, 2005, motion to declare rights as a motion for a judgment on the pleadings.

Nature of Remainder Beneficiaries' Motion

[5] Neb. Ct. R. of Pldg. in Civ. Actions 12(c) (rev. 2003) provides in part: "After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment

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[1] *In re Trust of Rosenberg*, 273 Neb. 59, 727 N.W.2d 430 (2007).

[2] *Id.*

[3] *Id.*

[4] *Id.*

on the pleadings." The remainder beneficiaries' August 15, 2005, filing is entitled "Motion of Remaindermen for a Declaration of Rights and Notice," not a request for a judgment on the pleadings. Moreover, a motion for judgment on the pleadings is properly granted when it appears from the pleadings that only questions of law are presented.[5]

The remainder beneficiaries admitted in their motion that there were issues of fact to be resolved but stated that "[t]he factual development of the case can still proceed to an ultimate determination of rights based upon the Court's legal guidance in an expeditious manner." Thus, their characterization of the motion as a request for a judgment on the pleadings is without merit.

Neither was the August 15, 2005, motion a request for a default judgment. The remainder beneficiaries did not allege that Ruth's estate had failed to file an answer, nor did they ask the court to determine that the trustee could not pay the billings for Ruth's care because of her estate's alleged default. Rather, they ask the county court to decide *whether* the trustee could pay the billings and, if so, what standards should be applied.

Moreover, we reject the remainder beneficiaries' argument that Ruth's estate "failed to answer [or] vacate the default judgment between August 23, 2005 and the date of the Order of December 22, 2005."[6] No judgment in this case was entered before December 23, 2005, and the county court had authority to combine the various requests for relief into one proceeding,[7] which consolidation the trustee specifically requested. Their motion is more properly characterized as seeking the court's direction in a matter of trust administration.

[6,7] The act of registering a trust gives the county court jurisdiction over the interests of all notified beneficiaries to decide issues related to any matter involving the trust's administration, including a request for instructions or an action to

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[5] *Johnson v. State*, 270 Neb. 316, 700 N.W.2d 620 (2005).

[6] Brief for appellees Kaminski and Scholder at 24.

[7] See Neb. Rev. Stat. § 30-3814(d) (Cum. Supp. 2006).

declare rights.[8] In exercising probate jurisdiction, a court may use equity power and principles to dispose of a matter within the court's probate jurisdiction.[9]

[8] Section 30-3812 does not limit to trustees the right to seek instructions from the court.[10] Further, Nebraska's declaratory judgment statutes allow trustees and persons interested in the administration of a trust to seek a declaration regarding any question arising in the administration of a trust.[11] Thus, without deciding the propriety of the remainder beneficiaries' motion under these circumstances, we construe their motion as a request for the court to instruct the trustee on its duties and powers.

This reading of § 30-3812 is consistent with a proposed rule for the Restatement (Third) of Trusts. As of the date of this opinion, the American Law Institute has tentatively approved the 2005 draft of the Restatement (Third) of Trusts § 71 at 9 (Tent. Draft No. 4, 2005), which provides: "A trustee or beneficiary may apply to an appropriate court for instructions regarding the administration or distribution of the trust if there is reasonable doubt about the powers or duties of the trusteeship or about the proper interpretation of the trust provisions."[12] Because a "beneficiary" includes persons with "a present or future beneficial interest in a trust, vested or contingent,"[13] the proposed Restatement rule also allows remainder beneficiaries to request the court to instruct a trustee on its powers and duties.

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[8] See Neb. Rev. Stat. §§ 30-3812 and 30-3819 (Cum. Supp. 2006).

[9] *In re Estate of Stephenson*, 243 Neb. 890, 503 N.W.2d 540 (1993). See, also, Neb. Rev. Stat. § 30-3806 (Cum. Supp. 2006).

[10] See *In re Trust of Rosenberg*, 269 Neb. 310, 693 N.W.2d 500 (2005).

[11] Neb. Rev. Stat. § 25-21,152 (Reissue 1995).

[12] See, also, American Law Institute, 82d Annual Meeting: 2005 Proceedings 313 (2005) (tentatively approving draft); George Gleason Bogert & George Taylor Bogert, The Law of Trusts and Trustees § 559 (rev. 2d ed. 1980).

[13] Neb. Rev. Stat. § 30-3803(3)(A) (Cum. Supp. 2006). See, also, Restatement (Third) of Trusts § 48, comment *a*. (2003).

Type of Trust Hansen Created

Ruth's estate argues that a trustee's liability for abusing its discretion during a beneficiary's lifetime is not extinguished by the beneficiary's death and that the county court could not make that determination without an evidentiary hearing. The remainder beneficiaries argue that "[u]nder a discretionary support trust, after a life beneficiary's death, the trustee cannot distribute assets to or for the beneficiary because the purpose of the trust related to the life beneficiary has ceased."[14]

[9,10] Under our de novo on the record review, we determine that the threshold issue presented by these arguments is what type of trust the settlor created. The extent of the beneficiary's interest in a trust depends upon the discretionary power that the settlor intended to grant the trustee.[15] When the parties do not claim that the terms are unclear or contrary to the settlor's actual intent, the interpretation of a trust's terms is a question of law.[16] The parties do not claim that the terms of the trust are unclear or fail to accurately reflect Hansen's intent. Thus, the type of trust he created is a question of law, and we conclude that the county court and both parties are laboring under an incorrect assumption that Hansen created a discretionary support trust, or hybrid trust.

We begin with the distinction between a support trust and discretionary trust, which we recently clarified in *Pohlmann v. Nebraska Dept. of Health & Human Servs.*[17]:

> "The settlor's intent determines whether a trust is classified as a support or a discretionary trust . . . . A support trust essentially provides the trustee 'shall pay or apply only so

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[14] Brief for appellees Kaminski and Scholder at 29.

[15] See, Restatement (Third) of Trusts, *supra* note 13, § 50(2); Restatement (Second) of Trusts § 128 (1959).

[16] See, § 30-3803(19); *In re Trust of Rosenberg*, *supra* note 1; *Smith v. Smith*, 246 Neb. 193, 517 N.W.2d 394 (1994). See, also, Neb. Rev. Stat. § 30-3841 (Cum. Supp. 2006).

[17] *Pohlmann v. Nebraska Dept. of Health & Human Servs.*, 271 Neb. 272, 280, 710 N.W.2d 639, 645 (2006), quoting *Eckes v. Richland Cty. Soc. Ser.*, 621 N.W.2d 851 (N.D. 2001). See, also, Restatement (Second) of Trusts, *supra* note 15, comments *d.* and *e.*

> much of the income and principal or either as is necessary for the education or support of a beneficiary.' . . . A support trust allows a beneficiary to compel distributions of income, principal, or both, for expenses necessary for the beneficiary's support . . . .
>
> "Conversely, a discretionary trust grants the trustee 'uncontrolled discretion over payment to the beneficiary' and may reference the 'general welfare' of the beneficiary. . . . [T]he beneficiary of a discretionary trust does not have the ability to compel distributions from the trust . . . ."

We further stated in *Pohlmann* that trust provisions granting trustees the power to pay trust assets to a beneficiary "'*as it may, from time to time, deem appropriate for* [*the beneficiary's*] *health, education, support or maintenance*' . . . do not create a right of the beneficiary to compel payments from the trust."[18]

Hansen, however, did not grant the trustee the same breadth of discretion created by the trust in *Pohlmann*. That is, Hansen did not provide that the trustee "'*may*, from time to time,'" make determinations of his daughter's needs; rather, he provided that "'the Trustee "*shall*"'" make payments for his daughter's benefit if she should require funds in excess of the trust's income because of an accident or illness.

This provision is the functional equivalent of a term providing that "'the trustee "*shall* pay or apply only so much of the . . . principal . . . as is necessary for the [medical care] . . . of a beneficiary."'"[19] The trustee had discretion to determine whether and how much additional support Ruth properly required as the result of an accident or illness, but it did not have discretion to determine whether to support her.[20] In general, trustees of support trusts have discretion to determine what is needed for the beneficiary's support and to make payments only for

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[18] *Pohlmann, supra* note 17, 271 Neb. at 280, 710 N.W.2d at 645 (emphasis in original), citing *Doksansky v. Norwest Bank Neb.*, 260 Neb. 100, 615 N.W.2d 104 (2000), and *Smith, supra* note 16.

[19] *Pohlmann, supra* note 17, 271 Neb. at 280, 710 N.W.2d at 645 (emphasis supplied).

[20] See, generally, *First Nat'l Bk. of Maryland v. Dep't of Health*, 284 Md. 720, 399 A.2d 891 (1979).

that purpose.[21] But this level of discretion does not preclude a beneficiary from seeking to show that a trustee has abused its discretion in failing to make support payments.[22]

The language of Hansen's trust indicates that his primary concern was the care of his daughters in the event of an accident or illness. We conclude that Hansen authorized the trustee to exercise the same degree of discretion created by an ordinary support trust but limited Ruth's interests in the trust's principal to the support she needed upon the happening of a designated event.[23] Having established which type of trust Hansen intended to create, we turn to the county court's determination regarding the trustee's postdeath obligations.

Right of Ruth's Estate to Recover Support Payments

Part of the county court's order shows it determined, as a matter of law, that a trustee cannot make payments for the beneficiary's last-illness expenses after the beneficiary's death, regardless of whether the medical bills were submitted to the trustee before or after the beneficiary's death. Relying on *Smith*,[24] the court concluded:

> [T]he purposes of the Hansen Trust (support of the beneficiary during her life) ended with the death of Ruth . . . . Payment of the medical bills and last illness expenses would benefit the creditors and heirs of the estate of Ruth . . . instead of Ruth . . . .
>
> It is clear that the Trustee acted properly, and in good faith, in denying payment of said expenses from the Trust funds.

If the county court had correctly determined that a beneficiary's estate could never recover expenses for the beneficiary's last illness after the beneficiary has died, then its further determination that the trustee had not abused its discretion in denying

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[21] See Bogert & Bogert, *supra* note 12, § 811.

[22] See *First Nat'l Bk. of Maryland, supra* note 20.

[23] See Restatement (Third) of Trusts, *supra* note 13, § 49, comment *f.*, and § 50, comment *d(4)*. Compare *Pyne v. Payne*, 152 Neb. 242, 40 N.W.2d 682 (1950).

[24] *Smith, supra* note 16.

such claims would necessarily follow, even without an evidentiary hearing. We conclude, however, that the county court interpreted our decision in *Smith* too broadly.

In *Smith*, this court stated that "support trusts may be reached by creditors for support-related debts, but that discretionary trusts may not be reached by creditors for any reason."[25] We held that the beneficiary's former wife could not reach two discretionary support trusts when the purpose of the trusts had ceased to exist. The trusts were intended to benefit the settlors' son and his children, in the event their parents were unable to do so. The son owed more than $90,000 in child support arrears, and his ex-wife filed two separate actions to garnish the trust assets for the debt, which actions were consolidated on appeal. In the first action, this court held that the trust assets could not be reached for child support arrears after the children were emancipated:

> [T]he payment of the child support arrearage would not further the purposes of the trusts, since the children are emancipated. Without a showing that the payment of the arrearage would contribute to the support of the beneficiaries of the trusts, [the trustee] could not be compelled to distribute trust assets.[26]

Smith is distinguishable, however, because the person attempting to reach the trust was the beneficiary's creditor. In the first action, she did not show that her claim against the son was support-related or would support his children if the parents were unable, because the children were emancipated. Nor were we dealing with a beneficiary's request for support payments in that action. In contrast to creditors, a personal representative has the same right to enforce a decedent's rights and claims that the decedent had immediately prior to death, where the cause of action survives death.[27]

The county court's reasoning that the payment of medical expenses would benefit Ruth's heirs instead of Ruth would also

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[25] *Id.* at 197, 517 N.W.2d at 398.

[26] *Id.* at 199, 517 N.W.2d at 399.

[27] See Neb. Rev. Stat. § 30-2464 (Cum. Supp. 2006).

apply if the trustee had failed to make quarterly payments to Ruth from her half of the trust's accrued income. But the general common-law rule is that a beneficiary's estate may recover income of the trust, which is accrued and payable at the time of the beneficiary's death but has not been paid over,[28] unless the trustee had uncontrolled discretion whether to make distributions of income.[29] We agree and note that this rule is consistent with our holding that the estate of a life tenant is entitled to profits accumulated through the life tenant's use of personalty in the life estate, in the absence of the testator's expressed contrary intent.[30]

[11] Accordingly, we conclude that *Smith* does not control here and that Ruth's estate can seek to enforce Ruth's interests in the trust to the extent that Ruth could have enforced her interests immediately before her death. We adopt the standard for an estate's recovery of the beneficiary's last-illness expenses from the Restatement (Third) of Trusts § 50 (2003), which concerns the enforcement of a beneficiary's interests and specifically deals with postdeath obligations.

When a beneficiary dies before payment for necessary services are rendered, the Restatement provides:

> A question may arise, following the death of the beneficiary of a discretionary interest, whether a support or other standard authorizes or requires the trustee to pay the beneficiary's funeral and last-illness expenses and debts incurred by the beneficiary for support. Ultimately, the question is one of interpretation when the terms of the trust are unclear, with the presumption being that the trustee has discretion to pay these debts and expenses.

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[28] See, e.g., *In re Trusteeship of Downer*, 232 Iowa 152, 5 N.W.2d 147 (1942); *Leverett v. Barnwell*, 214 Mass. 105, 101 N.E. 75 (1913); *Matter of Will of Hopkin*, 119 Misc. 2d 218, 462 N.Y.S.2d 587 (1983); Restatement (Second) of Trusts, *supra* note 15, § 235A; Annot., 141 A.L.R. 1466 (1942).

[29] *Green v. Gilmore*, 331 Mass. 283, 118 N.E.2d 755 (1954); *Minot v. Tappan*, 127 Mass. 333 (1879).

[30] See *In re Estate of Wecker*, 123 Neb. 504, 243 N.W. 642 (1932). See, also, Uniform Principal and Income Act, specifically Neb. Rev. Stat. § 30-3126(b) (Cum. Supp. 2006).

> A duty to do so is presumed only to the extent that (i) probate estate, revocable trust, and other assets available for these purposes are insufficient or (ii) the trustee, during the beneficiary's lifetime, either agreed to make payment or unreasonably delayed in responding to a claim by the beneficiary for which the terms of the trust would have required payment while the beneficiary was alive. (A deceased beneficiary's estate may also recover distributions the trustee had a duty to make but did not make during the beneficiary's lifetime.)[31]

Obviously, recovery under these factors presents factual issues as to whether the trustee abused its discretion or had a duty to make support payments, and the parties have not yet been given an opportunity to try these issues in an evidentiary hearing. In its order, the county court found that no claims for medical expenses were submitted to the trustee prior to Ruth's death. This finding, however, was contrary to statements made by counsel for Ruth's estate that it would show a request for support payments was made before Ruth's death. The court also found that Ruth was a businesswoman with "substantial income at her disposal," although no evidence in the record supports that finding.

[12,13] This court has very recently either reversed or vacated three separate county court orders for lack of competent evidence when the court failed to hold an evidentiary hearing on factual issues.[32] Neither the parties' arguments nor the court's discussions with the parties can substitute for providing the parties an opportunity to support or refute disputed factual issues raised by the pleadings.[33] Our adoption of the Restatement's postdeath obligation standard requires us to once again vacate

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[31] Restatement (Third) of Trusts, *supra* note 13, § 50, comment *d(5).* at 269. See, also, II Austin Wakeman Scott & William Franklin Fratcher, The Law of Trusts § 128.4 (4th ed. 1987).

[32] *In re Estate of Baer*, 273 Neb. 969, 735 N.W.2d 394 (2007); *In re Trust of Rosenberg, supra* note 10; *In re Guardianship & Conservatorship of Trobough*, 267 Neb. 661, 676 N.W.2d 364 (2004).

[33] See, *In re Trust of Rosenberg, supra* note 10; *In re Guardianship & Conservatorship of Trobough, supra* note 32.

the county court's order to hold an evidentiary hearing on the relevant factual issues.

[14] An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.[34] In light of our conclusion that the county court must conduct an evidentiary hearing to determine whether the trustee abused its discretion or had a duty to make support payments, it is unnecessary for us to reach the remaining assignments of error.

CONCLUSION

We conclude that the county court erred in determining, as a matter of law, that the trustee of a support trust cannot make payments for the beneficiary's last-illness expenses after the beneficiary's death without conducting an evidentiary hearing on factual issues relevant to that determination. We therefore reverse and vacate the court's order and remand the cause to the county court with directions to hold an evidentiary hearing on the issues outlined in this opinion.

REVERSED AND VACATED, AND CAUSE REMANDED WITH DIRECTIONS.

MILLER-LERMAN, J., not participating.

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[34] *State v. Morrow*, 273 Neb. 592, 731 N.W.2d 558 (2007).

PAPILLION RURAL FIRE PROTECTION DISTRICT, APPELLEE, V. CITY OF BELLEVUE, A MUNICIPAL CORPORATION, APPELLANT.

739 N.W.2d 162

Filed August 31, 2007. No. S-06-308.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.

3. **Appeal and Error.** An appellate court may, at its discretion, discuss issues unnecessary to the disposition of an appeal where those issues are likely to recur during further proceedings.
4. ____. An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the controversy before it.

Appeal from the District Court for Sarpy County: WILLIAM B. ZASTERA, Judge. Reversed and remanded for further proceedings.

Frank F. Pospishil and Timothy M. Kenny, of Abrahams, Kaslow & Cassman, L.L.P., for appellant.

Michael N. Schirber, of Schirber & Wagner, L.L.P., for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MCCORMACK, J.

NATURE OF CASE

The Papillion Rural Fire Protection District (the District) brought an action for declaratory judgment to determine the rights, duties, and obligations of the District and the City of Bellevue (the City). This suit arose as a result of the City's partial annexation of property formerly located within the District. The district court granted the District's motion for summary judgment and entered judgment against the City in an amount which was to be calculated using a formula set forth in the court's order.

The City appealed the district court's decision to the Nebraska Court of Appeals, which dismissed the appeal because the judgment for money was not specified with definiteness and certainty.[1] Following its dismissal of the City's appeal, the Court of Appeals issued a mandate ordering the district court to enter judgment in conformity with the Court of Appeals' opinion. The district court then entered a new order which specified the

[1] *Papillion Rur. Fire Prot. Dist. v. City of Bellevue*, 13 Neb. App. lvi (No. A-05-116, May 9, 2005).

amount of damages to be awarded to the District and included a new award for prejudgment interest. The City now appeals.

BACKGROUND

The District is a rural fire protection district under the provisions of Neb. Rev. Stat. § 35-501 et seq. (Reissue 2004), which is located in Sarpy County, Nebraska. In 1998, the District had issued bonds in the principal sum of $1.5 million. The stated purposes were to "acquir[e] fire fighting equipment and emergency equipment and other fire and rescue equipment and apparatus" and "to pay costs of issuance and underwriting associated with issuance" of those bonds. These bonds are a general obligation of the District payable from the District's tax levy. According to the prospectus for the bonds, the bond issue was the only debt of the District.

Following the issuance of the bonds, the District entered into an agreement with the Papillion Volunteer Fire Department, Inc. (the Volunteers). Under this agreement, the District agreed to purchase fire and rescue apparatus and equipment from the Volunteers for approximately $956,000 and to lease that equipment to the Volunteers for $1 for a period of 5 years with the option to renew the lease term for an additional 5-year period. In 2001, the District and the city of Papillion entered into an interlocal cooperation agreement which created an intergovernmental mutual financing organization to be funded by the District and the city of Papillion. The interlocal agreement provided that the city of Papillion would create a fire department to provide all fire and rescue services for both the city of Papillion and the District, using the District's equipment and apparatus. The District and the city of Papillion agreed to share the expenses of the city of Papillion's fire department. And the District agreed to excuse the partial annexation agreement payments due to the District from the city of Papillion. Following the execution of the interlocal agreement, the District and the Volunteers mutually terminated their agreement.

In December 1999, the City passed, approved, and adopted a series of annexation ordinances which annexed portions of the territory located within the District's service and taxing area. At the time of the annexation, the District, including the annexed

territory, remained subject to a levy for the 1998 bonded indebtedness. Following the 1999 annexation, representatives of the City and the District discussed the appropriate division of assets, liabilities, maintenance, or other obligations of each arising out of the annexation. The parties, however, were unable to reach an agreement.

Thereafter, the District instituted the present action in the district court. In its operative petition, the District sought a declaratory judgment for an adjustment of all matters growing out of or in any way connected with the annexations by the City, and a decree fixing the rights, duties, and obligations of the parties. The District also sought an award of attorney fees, court costs, and other relief as may be appropriate. Discovery in the matter ensued. On August 27, 2004, the City filed a motion to compel the District to fully respond to the City's first set of interrogatories and the City's first request for production of documents. The City alleged in its motion to compel that the District failed to fully respond to its interrogatories. The district court denied the City's motion to compel, and the City filed a motion for reconsideration of the court's decision, which the district court also denied.

On August 13, 2004, the District filed a motion for summary judgment. In its response and supplemental response to the District's motion for summary judgment, the City argued in relevant part that material questions of fact existed as to (1) the exact nature of the District's assets; (2) whether the District's assets should be divided and distributed to the City, or whether the City should be allowed a setoff of the amount of such assets if the court determines the City has any liability to the District; (3) the division of liabilities, maintenance, and other obligations under Neb. Rev. Stat. § 31-766 (Reissue 2004); (4) whether § 31-766 is contradicted by prorating only debt for each partial annexation; and (5) the effect the interlocal cooperation agreement entered into between the District and the city of Papillion, which created a mutual finance organization, has on the allocation under § 31-766.

On January 3, 2005, the court issued an order granting the District's motion for summary judgment. The court stated in part that the City's claim that the allocation formula should include a

valuation of the assets of the District less the bonded debt would result in an absurd result. This is because the City could annex all but a small portion of the District and pay none of the debt associated with the annexation. The court further stated that subsequent to *Millard Rur. Fire Prot. Dist. No. 1 v. City of Omaha*,[2] § 35-508 was amended to allow for a sinking fund to be funded by tax revenues for the District's use for those items set out in the statute. The court found that in dividing the equities, the value of the sinking fund must be considered and that this value should be deducted from the bonded debt in determining the City's liability. Notwithstanding the fact that the court could not determine from the evidence whether a sinking fund exists or its value if it does exist, the court found that it did not give rise to a material issue of fact. The district court then entered judgment against the City based on the calculation of the following formula which was set out in the court's order: "*Bonded debt - (12.4528 % of sinking fund) = (Debt subject to allocation) x 12.4528% = Amount of debt owed by Defendant.*"

The City appealed the court's January 3, 2005, order to the Court of Appeals. Citing *Lenz v. Lenz*[3] for the proposition that a judgment must be sufficiently certain in its terms to be able to be enforced in a manner provided by law and a judgment for money must specify with definiteness and certainty the amount for which it is rendered, the Court of Appeals dismissed the City's appeal. The Court of Appeals issued its mandate to the district court ordering it to "without delay, proceed to enter judgment in conformity with the judgment and opinion of this court."

The district court then entered the following journal entry: "Mandate from the Court of Appeals having been received, Judgment entered in conformance with Mandate." The particulars of this judgment, however, are not in the record before us.

The District then filed a motion requesting the district court to enter an order clarifying, interpreting, and correcting the court's January 3, 2005, summary judgment order by specifying

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[2] *Millard Rur. Fire Prot. Dist. No. 1 v. City of Omaha*, 226 Neb. 50, 409 N.W.2d 574 (1987).

[3] *Lenz v. Lenz*, 222 Neb. 85, 382 N.W.2d 323 (1986).

the amount of money judgment in favor of the District, by determining prejudgment interest, and for such other and further equitable relief as the court deemed just and proper. At the hearing on the District's motion, the District requested that the court take judicial notice of an affidavit of Kevin Edwards, the administrator for the District, which affidavit was dated September 22, 2005. Attached to Edwards' affidavit was a calculation which showed that the City's liability to the District was $84,491.88. The affidavit included notations regarding the District's sinking fund, which were not contained in the affidavit before the court when the original order of summary judgment was entered. The City objected to the court's taking judicial notice of the affidavit. The district court stated that it was going to reserve ruling on the affidavit, however, the record does not reflect a specific ruling on the affidavit. The court did, however, refer to the affidavit in its February 21, 2006, order.

On February 21, 2006, the district court entered an order in which it awarded the District judgment against the City in the amount of $84,491.88, with prejudgment interest at 4.038 percent from October 21, 2004. In its order, the court stated that it viewed the District's September 30, 2005, motion as "one to amend [the court's] judgment and the mandate to make the same certain." The court also noted that Edwards' September 22 affidavit was attached to the District's motion, along with a worksheet showing Edwards' calculation. This calculation indicated that the City owed the District $84,491.88, and attested that any prior sinking fund moneys were accounted for in his calculations and were included in that figure. In response to an argument by the City that the court did not have jurisdiction over the matter, the court stated that pursuant to Neb. Rev. Stat. § 25-2001 (Cum. Supp. 2004), it "has the inherent power to vacate or modify its judgments or orders . . . after the term at which they were made." The court stated that the District filed its motion during the term and concluded that it clearly has the power to revisit its own judgment. The court further stated that once the appeal was dismissed by the Court of Appeals, jurisdiction was revested in the district court, and that the Court of Appeals' mandate and accompanying notation required it to retake jurisdiction and conform its judgment to the Court of

Appeals' order. Thereafter, the City timely perfected the present appeal.

ASSIGNMENTS OF ERROR

The City's assignments of error, which have been partially consolidated, are that the district court erred in (1) amending and modifying its January 3 and June 16, 2005, orders to comply with the mandate of the Court of Appeals by entering an amended final order on February 21, 2006, and awarding the District a judgment against the City in the amount of $84,491.88 with prejudgment interest at 4.038 percent from October 21, 2004, which amount was not from a clarification of the court's January 3, 2005, order, but from consideration of an affidavit made subsequent to the mandate; (2) granting the District's motion for summary judgment; (3) not applying the provisions of § 31-766 to the partial annexation involved in this matter; (4) not granting the City's motion to compel discovery and motion for partial reconsideration of the City's motion to compel discovery from the District; (5) not following the Court of Appeals' May 9, 2005, disposition and June 13 mandate which fully concluded this litigation; (6) allowing the District prejudgment interest; and (7) taking judicial notice of the untimely Edwards affidavit and erroneously using this affidavit to calculate the judgment entered in favor of the District and against the City.

STANDARD OF REVIEW

[1,2] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[4] In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.[5]

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[4] *Alston v. Hormel Foods Corp.*, 273 Neb. 422, 730 N.W.2d 376 (2007).

[5] *Id.*

ANALYSIS

District's Motion for Summary Judgment

We first address the City's claim that the district court erred in granting the District's motion for summary judgment.

Section 31-766 addresses the division of assets, liabilities, maintenance, or other obligations of a fire protection district when the district is partially annexed by a city or village. Section 31-766 provides in part:

> The division of assets, liabilities, maintenance, or other obligations of the district shall be equitable, shall be proportionate to the valuation of the portion of the district annexed and to the valuation of the portion of the district remaining following annexation, and shall, to the greatest extent feasible, reflect the actual impact of the annexation on the ability of the district to perform its duties and responsibilities within its new boundaries following annexation.

Section 31-766 provides further that if the district and city or village do not agree on the proper adjustment of all matters growing out of the partial annexation, the district or the annexing city or village may apply to the district court for an adjustment of matters growing out of the annexation. And under § 31-766, the district court is authorized to enter an order or decree fixing the rights, duties, and obligations of the parties.

We last addressed the allocation of assets, liabilities, maintenance, and other obligations under § 31-766 in *Millard Rur. Fire Prot. Dist. No. 1 v. City of Omaha*.[6] In that case, the Millard Fire Protection District (the Millard District) brought a declaratory action to determine the rights, duties, and responsibilities of the Millard District and the City of Omaha with regard to areas of the Millard District annexed by the City of Omaha. We affirmed on appeal the district court's determination that an equitable method of determining the City of Omaha's assumption of the Millard District's indebtedness was to multiply the Millard District's net debt by the percentage of the valuation of

[6] *Millard Rur. Fire Prot. Dist. No. 1 v. City of Omaha,* *supra* note 2.

the territory annexed. We did not, however, find that this was the only equitable method.

On appeal, the Millard District asserted that the district court incorrectly calculated the division of assets, liabilities, maintenance, and other obligations of the Millard District. The Millard District argued that in addition to assuming a percentage of its bond debt, the City of Omaha should have had to assume a percentage of the Millard District's ongoing operation and maintenance expenses relating to the entire Millard District. We noted that the Millard District ignored the fact that the City of Omaha assumed full responsibility of the operation and maintenance of the annexed areas. We further noted that although the annexation removed property from the Millard District's tax base, the record showed that the actual value of the property in Douglas County remaining within the Millard District had risen from $132 million in 1968 to approximately $751 million in 1984. We then concluded that based on the circumstances of that case, an equitable division resulted from the following method: a pro rata assumption of net bonded indebtedness, "along with assumption of responsibility for providing fire and rescue services to the annexed areas."[7]

In its January 3, 2005, order, the district court entered summary judgment in favor of the District based on the formula set forth in *Millard Rur. Fire Prot. Dist. No. 1*, with one modification. In determining the debt subject to allocation, the court subtracted from the bonded indebtedness the percentage of the annexed property's proportion of the sinking fund. The City argues that the allocation formula in *Millard Rur. Fire Prot. Dist. No. 1* is not controlling in this case and that the district court should take into consideration the assets of the District in order to achieve an equitable adjustment under § 31-766.

In *Millard Rur. Fire Prot. Dist. No. 1*, we were presented with the question of whether an equitable adjustment under § 31-766 required the assumption by the City of Omaha of a percentage of the Millard District's maintenance expenses, in addition to an assumption of a portion of the Millard District's bond debt. As we explained, the City of Omaha did assume a

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[7] *Id.* at 58, 409 N.W.2d at 579.

percentage of the Millard District's maintenance expenses by taking control of the annexed land. Thus, under the facts in that case, we determined that the equitable division was a pro rata assumption by the City of Omaha of the Millard District's bond debt. In *Millard Rur. Fire Prot. Dist. No. 1*, unlike in the present case, the allocation of the Millard District's assets was not at issue. We conclude that *Millard Rur. Fire Prot. Dist. No. 1* is, therefore, distinguishable.

Section 31-766 specifically includes assets of a fire district in those items to be equitably divided when a fire district is partially annexed. Thus, where there is evidence that the partially annexed fire district has assets, those assets should be considered in determining a proper adjustment of those matters growing out of the annexation.

The evidence in the record now before us indicates that the District has significant assets which were not considered by the district court. We conclude that under the facts presented here, an equitable division under § 31-766 should take into account any assets of the District.

Because the district court did not consider the District's assets and because questions remain as to the extent of the District's assets, we conclude that the district court erred by entering summary judgment in favor of the District. We therefore reverse the order and remand the cause to the district court for further proceedings.

Limitations on Discovery

[3] Although we have concluded that the order of summary judgment in favor of the District must be reversed and the cause remanded for further proceedings, we will address the City's assignment of error relating to the City's motion to compel discovery and motion for partial reconsideration of the City's motion to compel discovery from the District. This issue is likely to recur on remand. An appellate court may, at its discretion, discuss issues unnecessary to the disposition of an appeal where those issues are likely to recur during further proceedings.[8]

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[8] *Tyma v. Tyma*, 263 Neb. 873, 644 N.W.2d 139 (2002).

In denying the City's motion to compel discovery, the district court explained that those issues or items to be discovered must be relevant to the issues being litigated. The district court further explained that in light of *Millard Rur. Fire Prot. Dist. No. 1*, the information the City sought to discover was not relevant. We conclude that to the extent that the information sought to be discovered by the City relates to assets, liabilities, maintenance, or other obligations of the District, the City should be permitted full discovery. We reverse the district court's denials of the City's motion to compel and motion for reconsideration to the extent that the denials conflict with our holding.

Remaining Assignments of Error

[4] Because we have determined that the district court erred by entering summary judgment in favor of the District, we do not address the City's remaining assignments of error. An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the controversy before it.[9]

CONCLUSION

For the reasons discussed, we conclude that questions of material fact exist and that the district court erred in entering summary judgment in favor of the District. We therefore reverse the order and remand the cause for further proceedings. We further conclude that the City should be permitted full discovery of the District's assets, liabilities, maintenance, and other obligations. We reverse the district court's denials of the City's motion to compel and motion to reconsider to the extent that the court's denials conflict with our decision on this issue.

Reversed and remanded for
further proceedings.

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[9] *Gary's Implement v. Bridgeport Tractor Parts*, 270 Neb. 286, 702 N.W.2d 355 (2005).

In re Petition of Nebraska Community Corrections Council to Adopt Voluntary Sentencing Guidelines for Felony Drug Offenses.

738 N.W.2d 850

Filed August 31, 2007. No. S-36-070001.

Original action. Petition denied.

Heavican, C.J., Wright, Connolly, Gerrard, Stephan, McCormack, and Miller-Lerman, JJ.

Connolly, J.

The Legislature has mandated by statute that we promulgate by court rule sentencing guidelines for certain offenses.[1] Under the guidelines, courts must consider community correctional programs and facilities in sentencing offenders. In February 2007, the legislatively created Community Corrections Council petitioned this court to adopt its proposed guidelines. We invited the public to comment on the proposed guidelines. Several members of the judiciary raised concerns related to separation of powers. We conducted a hearing in April.

We agree that the Legislature's mandate violates the Nebraska Constitution's separation of powers clause.[2] We deny the Community Corrections Council's petition, because we conclude that the Legislature cannot delegate to the judicial branch its constitutional power to enact the laws of this state.

OVERVIEW OF THE CREATION UNDER L.B. 46 OF COMMUNITY CORRECTIONS COUNCIL AND SENTENCING GUIDELINES

In 2001, the Governor convened the Community Corrections Working Group. The group worked within the Nebraska Commission on Law Enforcement and Criminal Justice. The group's goal was to address Nebraska's rising prison costs by (1) developing less expensive community-based correctional options for nonviolent offenders and (2) reducing the State's

[1] Neb. Rev. Stat. § 47-630 (Reissue 2004 & Cum. Supp. 2006).

[2] Neb. Const. art. II, § 1.

reliance on incarceration for these offenders.[3] In passing 2003 Neb. Laws, L.B. 46, the Legislature adopted many of the group's proposals.[4]

At the committee hearing, the introducer of L.B. 46 stated that the goal was "to limit the use of incarceration" and "to prevent Nebraska's correctional system from bankrupting the state of Nebraska."[5] He explained that the budget for the Department of Correctional Services had increased 100 percent from fiscal year 1996-97 to fiscal year 2002-03. He projected that even with completion of a new correctional facility in 2001, the prison population would reach 153 percent of design capacity by 2005.[6]

In passing L.B. 46, the Legislature enhanced treatment programs for substance abuse offenders and required participants in both probation and non-probation-based programs to pay fees toward the costs of services.[7] Also, as part of L.B. 46, the Legislature enacted the Community Corrections Act.[8] The act establishes community-based correctional alternatives for some offenders. The Legislature specifically intended to

> [p]rovide for the development and establishment of community-based facilities and programs in Nebraska for adult offenders and encourage the use of such facilities and programs by sentencing courts and the Board of Parole as alternatives to incarceration or reincarceration, in order to reduce prison overcrowding and enhance offender supervision in the community.[9]

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[3] Legislative Research Division, A Review: Ninety-Eighth Legislature, First Session (2003).

[4] See Statement of Intent, Judiciary Committee, 98th Leg., 1st Sess. (Feb. 13, 2003).

[5] Judiciary Committee Hearing, 98th Leg., 1st Sess. 24, 26 (Feb. 13, 2003).

[6] *Id.*

[7] See Neb. Rev. Stat. §§ 29-2252(14), 29-2262.06, and 29-2266 (Cum. Supp. 2006). See, also, Neb. Rev. Stat. § 29-2246 (Cum. Supp. 2006).

[8] See Neb. Rev. Stat. §§ 47-619 to 47-634 (Reissue 2004).

[9] § 47-620(1).

To carry out the program, the act created the Community Corrections Council (hereinafter the Council).[10] The Council's duties include (1) developing a statewide plan for community correctional facilities and programs,[11] (2) developing eligibility standards for probationers and parolees in community facilities and programs,[12] and (3) recommending sentencing guidelines for adoption by this court.[13]

In addition to mandating that the Council develop sentencing guidelines, the Legislature also mandated that we adopt sentencing guidelines: "In order to facilitate the purposes of the Community Corrections Act, the Supreme Court shall by court rule adopt guidelines for sentencing of persons convicted of certain crimes."[14]

Also, § 47-630(4) provides that "[t]he Council shall develop and periodically review the guidelines and, when appropriate, recommend amendments to the guidelines." Obviously, this means the Council would periodically recommend that we adopt amendments to the guidelines.

In February 2007, the Council filed a petition with this court requesting that we adopt and implement by court rule its "voluntary sentencing guidelines for felony drug offenses." The Council also asked that we develop, in coordination with the Council, protocols and curriculum for training judges, probation officers, county attorneys, and defense counsel.

COMPOSITION OF SENTENCING GUIDELINES

As its title shows, the Council's proposed sentencing guidelines apply only to the sentencing of felony drug offenders. Woven into the guidelines' fabric is a matrix of sentencing ranges, in months, which ranges fall within the statutory minimum and maximum sentences for an offense. A sentencing judge would select a sentencing range by finding the intersection

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[10] § 47-622.

[11] See § 47-624(14).

[12] § 47-624(6).

[13] § 47-624(4).

[14] § 47-630(1).

of coordinate points on horizontal and vertical axes. Points on the horizontal axis of the matrix represent criminal history categories, and points on the vertical axis represent crime severity levels. In addition, the matrix is color coded into three recommended types of sentences.

From this mosaic, the Council recommends that a judge sentence a defendant to a prison term if the defendant's plotted sentence falls within the matrix's yellow, or upper, section. It recommends that a judge sentence a defendant to probation if the plotted sentence range falls within the matrix's light blue, or lower, section. Finally, defendants whose plotted sentence ranges fall within the dark blue, or intermediate, section are eligible for community-based correction alternatives. A judge may divert these defendants from prison.

HEARING ON THE COUNCIL'S PETITION TO ADOPT ITS SENTENCING GUIDELINES

In April 2007, we heard argument on the Council's petition. The chairman, Kermit Brashear, spoke for the Council. He stated that in June 2006, the prison population had reached the emergency level—140 percent of capacity[15]—and was currently around 139 percent of capacity. He further stated that if action were not taken, another prison would have to be built. Brashear also reported that in a 6-year period, the budget for the Department of Correctional Services had doubled from $60 million to $120 million, and that it would double again at a time when the State was facing declining revenues.

He stated that the Council had targeted nonviolent felony drug offenders in its initial guidelines because these offenders make up 27 percent of the maximum-security prison population. The Council believed many offenders could be diverted into alternative correction programs.

Finally, Brashear stated that treatment within prisons is the least effective but most costly way of dealing with drug offenders and reducing their recidivism. He reported that incarceration costs $30,000 per year for each offender, while substance abuse

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[15] See Correctional System Overcrowding Emergency Act, Neb. Rev. Stat. §§ 83-960 to 83-963 (Cum. Supp. 2006).

supervision programs cost about $3,000 per year and are more effective in reducing recidivism.

OVERVIEW OF THE SEPARATION OF POWERS CLAUSE

Nebraska's separation of powers clause[16] prohibits the three governmental branches from exercising the duties and prerogatives of another branch.[17] It also prohibits a branch from improperly delegating its own duties and prerogatives—except as the constitution directs or permits.[18] Our constitution, unlike the federal Constitution and those of several other states, contains an express separation of powers clause. So we have been less willing to find overlapping responsibilities among the three branches of government.[19]

Deciding whether the Nebraska Constitution has committed a matter to another governmental branch, or whether the branch has exceeded its authority, is a delicate exercise in constitutional interpretation.[20] And it is our responsibility, as the ultimate interpreter of our constitution, to make that decision.[21]

As we know, the line between what is a legislative function and what is a judicial one has not been drawn with precision; we make that decision on a case-by-case basis.[22] In defining that line, we look at the function's purpose—not merely its statutory origin—to decide whether a governmental function is legislative or judicial.[23]

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[16] Neb. Const. art. II, § 1.

[17] See, *Nebraska Coalition for Ed. Equity v. Heineman*, 273 Neb. 531, 731 N.W.2d 164 (2007); *Polikov v. Neth*, 270 Neb. 29, 699 N.W.2d 802 (2005).

[18] *Polikov v. Neth, supra* note 17.

[19] *Id.*

[20] *Nebraska Coalition for Ed. Equity v. Heineman, supra* note 17, citing *Baker v. Carr*, 369 U.S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962).

[21] See, *State ex rel. Johnson v. Gale*, 273 Neb. 889, 734 N.W.2d 290 (2007); *Nebraska Coalition for Ed. Equity v. Heineman, supra* note 17.

[22] *State v. Stratton*, 220 Neb. 854, 374 N.W.2d 31 (1985); *Lux v. Mental Health Board of Polk County*, 202 Neb. 106, 274 N.W.2d 141 (1979).

[23] See *Lux v. Mental Health Board of Polk County, supra* note 22.

Powers of the Legislative Branch

As imprecise as the line between the branches may sometimes be, logic and case law dictate that it is the Legislature's function through the enactment of statutes to declare the law and public policy and to define crimes and punishments.[24] In defining crimes and punishments, it sets the broad policy goals of this state's criminal justice system, including whether, for a particular type of crime, the corrective goal should be retribution, deterrence, or rehabilitation.[25]

In setting out the Legislature's powers to define crimes and punishments, we have stated:

> [T]he Legislature has the authority to fix the penalty range which can be imposed for the crimes it has defined. The Legislature determines the nature of the penalty imposed, and so long as that determination is consistent with the Constitution, it will not be disturbed by the courts on review. In this regard, in *State v. Tucker*,[26] we observed: "'The legislature is clothed with the power of defining crimes and misdemeanors and fixing their punishment; and its discretion in this respect, exercised within constitutional limits, is not subject to review by the courts.'"[27]
>
> We have [also] stated: "The range of the penalty for any offense is a matter for legislative determination. The court exercises its discretion as to the penalty to be applied under any particular state of facts within the range provided by the law."[28] Thus, once the Legislature has defined the crime and the corresponding punishment for a violation of the crime, the responsibility of the judicial branch is to apply those punishments according to the nature and range established by the Legislature.[29]

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[24] *Stewart v. Bennett*, 273 Neb. 17, 727 N.W.2d 424 (2007).

[25] *Id.*

[26] *State v. Tucker*, 183 Neb. 577, 579, 162 N.W.2d 774, 776 (1968), quoting *State ex rel. Nelson v. Smith*, 114 Neb. 653, 209 N.W. 328 (1926).

[27] See *State v. Tatreau*, 176 Neb. 381, 126 N.W.2d 157 (1964).

[28] *Id.* at 392, 126 N.W.2d at 163.

[29] *State v. Divis*, 256 Neb. 328, 333-34, 589 N.W.2d 537, 541 (1999).

In short, the Legislature defines crimes and establishes the range of penalties.

Powers of the Judicial Branch

This court's primary duty is the proper and efficient administration of justice.[30] Although this court's decisions establish substantive rules of law, those rules have developed in resolving parties' disputes in real cases and controversies. We have often held that an actual case or controversy must exist before a court can exercise judicial power.[31] We do not have power to *enact* substantive laws of general applicability, because that power is exclusively reserved to the Legislature. In criminal law, substantive laws are those that declare what acts are crimes or prescribe the corresponding punishment.[32]

This court also has inherent judicial power to do whatever is reasonably necessary for the proper administration of justice,[33] and this includes supervisory power over the courts.[34] But the Council's petition does not call on us to exercise our supervisory powers. For example, it has not asked us to collect statistical data on sentencing to decide whether sentencing disparity exists.

Finally, under the Nebraska Constitution, we have independent procedural rulemaking power.[35] We believe, however, that by adopting the guidelines, we would be establishing the presumptive sentencing ranges that courts must consider. The proposed guidelines, therefore, are not procedural rules.

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[30] *State v. Joubert*, 246 Neb. 287, 518 N.W.2d 887 (1994).

[31] See, e.g., *Johnston v. Nebraska Dept. of Corr. Servs.*, 270 Neb. 987, 709 N.W.2d 321 (2006).

[32] See, *Barnes v. Scott*, 201 F.3d 1292 (10th Cir. 2000); *Smith v. State*, 537 So. 2d 982 (Fla. 1989). See, also, *Miller v. Florida*, 482 U.S. 423, 107 S. Ct. 2446, 96 L. Ed. 2d 351 (1987); *State v. Gales*, 265 Neb. 598, 658 N.W.2d 604 (2003).

[33] *In re Estate of Reed*, 267 Neb. 121, 672 N.W.2d 416 (2003); *State v. Joubert, supra* note 30.

[34] See, *In re Interest of Mainor T. & Estela T.*, 267 Neb. 232, 674 N.W.2d 442 (2004); *Wassung v. Wassung*, 136 Neb. 440, 286 N.W. 340 (1939).

[35] See Neb. Const. art. V, § 25.

SENTENCING GUIDELINES ARE SUBSTANTIVE LAW

The Council's comments to the guidelines state that sentences within the matrix are "'voluntary.'" It is true that the guidelines' enforcement mechanisms support an argument that the guidelines are voluntary: a sentence could not be reversed on appeal solely because of a judge's departure from a recommended range. Nevertheless, the guidelines set forth the preferred sentencing policy and, in fact, discourage departure. Section 47-630(2) provides: "The guidelines shall specify appropriate sentences for the designated offenders in consideration of factors set forth by rule. The Supreme Court may provide that a sentence in accordance with the guidelines constitutes a rebuttable presumption."

We interpret § 47-630(2) to mean that the Legislature intended this court's adoption of the guidelines to represent the presumptively appropriate sentences. Further, while the guidelines are not binding, § 47-630(1) compels a judge to consider them: "The guidelines *shall provide that courts are to consider* community correctional programs and facilities in sentencing designated offenders, with the goal of reducing dependence on incarceration as a sentencing option for nonviolent offenders." (Emphasis supplied.) Finally, the guidelines would require judges to explain in a written report their reasons for departing from the recommended sentencing guidelines range. In rejecting a similar legislative mandate to adopt sentencing guidelines, the Wisconsin Supreme Court observed:

> The very requirement of explaining "departure" from the guidelines creates a presumption that a sentence within the range set forth in the matrix for the particular offense/offender categories is appropriate, for it places the burden of showing the appropriateness of a sentence outside the matrix range on the sentencing judge. This, we believe, amounts to our prescribing "appropriate" types and lengths of sentences and constitutes unwarranted intrusion in the sentencing discretion and authority of the trial judge.[36]

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[36] *In re Felony Sentencing Guidelines*, 113 Wis. 2d 689, 697-98, 335 N.W.2d 868, 872-73 (1983).

We agree. Despite its "voluntary" label, requiring judges to explain their "departures" gives the guidelines a presumptive status. We do not believe we should promulgate rules that would effectively curb and conflict with the sentencing discretion a court currently has under Neb. Rev. Stat. § 29-2204 (Cum. Supp. 2006).

The Council, of course, views the matter differently. It points to the state court rules regarding sentencing guidelines in Delaware and Kansas. We note, however, that while the Kansas courts may have participated in developing Kansas' sentencing guidelines, the Kansas Legislature has statutorily enacted the guidelines and their presumptive status.[37]

It is true that the Delaware Supreme Court, through an administrative directive, has adopted presumptive sentencing guidelines as recommended by the state's sentencing commission.[38] The Delaware sentencing guidelines are found neither in the court's rules nor in the state's statutes or administrative code. Instead, they are produced by the state's sentencing commission in a publication called the "Benchbook."[39] Our research, however, has failed to find any decision by the Delaware Supreme Court upholding its adoption of presumptive sentencing ranges against a separation of powers challenge. Because of our constitution's structure, we decline to follow Delaware's model.

More on point, we note that in 1983, the Florida Supreme Court also promulgated sentencing guidelines by court rule in response to a legislative mandate. But, in 1989, the court determined that its rules violated the state constitution's separation of powers clause.[40]

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[37] See Kan. Stat. Ann. §§ 21-4701 to 21-4728 (1995 & Cum. Supp. 2006).

[38] See *Siple v. State*, 701 A.2d 79 (Del. 1997).

[39] Delaware Sentencing Accountability Comm., Benchbook (2006), http://cjc.delaware.gov/PDF/FinalBB2006.pdf. See, e.g., *Teti v. State*, No. 500,2005, 2006 WL 1788351 (Del. June 28, 2006) (unpublished disposition listed in table of "Decisions Without Published Opinions" at 905 A.2d 747 (Del. 2006)).

[40] *Smith v. State, supra* note 32.

Similarly, the Michigan Supreme Court had promulgated presumptive sentencing guidelines by administrative order beginning in 1984. But,

> [t]he Michigan Supreme Court's guidelines and legislative system of disciplinary credits [were] criticized for several reasons, such as excessive leniency, inadequate punishment, and undue harshness. As a result, a systematic statutory sentencing structure was developed and enacted into law to replace the judicially-imposed sentencing guidelines [in] 1999 . . . .[41]

This criticism of judicially imposed sentencing guidelines emphasizes the difficult position in which a court places itself when it specifically prescribes sentencing policy outside a pending case. We would compromise our neutrality, in perception if not in fact, if we promulgated the very law that could be challenged. The attraction of delegating potentially controversial legislation to the judiciary is perhaps understandable. But by complying with the Legislature's mandate, we would undermine the separation of powers doctrine:

> The purpose of the doctrine . . . is to preserve the independence of each of the three branches of government in their own respective and proper spheres, thus tending to prevent the despotism of an oligarchy of the Legislature or judges, or the dictatorship of the executive, or any cooperative combination of the foregoing. In the words of Justice Brandeis, "[The purpose was] not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy."[42]

In addressing a separation of powers issue regarding pretrial diversion, we specifically held that the power to design formal

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[41] Miriam A. Cavanaugh, Note, *If You Do the Crime, You WILL Do the Time: A Look at the New "Truth in Sentencing" Law in Michigan*, 77 U. Det. Mercy L. Rev. 375, 386 (2000) (citing legislative analysis).

[42] *Prendergast v. Nelson*, 199 Neb. 97, 124-25, 256 N.W.2d 657, 673 (1977) (Clinton, J., concurring in part, and in part dissenting), quoting *Myers v. United States*, 272 U.S. 52, 47 S. Ct. 21, 71 L. Ed. 160 (1926).

pretrial diversion programs is a legislative power.[43] We reasoned that the adoption of formal pretrial diversion programs represents a shift in focus from deterrence and retribution to rehabilitation.[44] That same reasoning applies to sentencing schemes that result in many offenders avoiding incarceration.

Even more to the point, the Legislature may not implement sentencing policy through delegation that is contrary to its current policy under § 29-2204. Section 29-2204 broadly sets forth a policy of indeterminative sentencing with no presumptive sentencing ranges.

We commend the Legislature's efforts to enact safe and effective means of treating substance abuse in the community and to address the rising costs of state correctional facilities. To the extent that substance abuse offenders have increased the prison population, we have cooperated with the Legislature's statutory mandate that we promulgate procedural rules for drug courts after the Legislature created these courts.[45] But the Legislature has not asked this court to promulgate procedural rules to govern court administration of a program enacted by the Legislature. Instead, it has asked us to promulgate substantive rules regarding sentencing that would carry out a sea change in sentencing policy.

Unquestionably, imposing sentencing guidelines presents challenging issues of public policy. We have repeatedly held that the Legislature cannot statutorily confer upon the courts the duties of other branches.[46] These public policy decisions should be debated in the proper forum—the Legislature. We reject the

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[43] *Polikov v. Neth, supra* note 17.

[44] *Id.*

[45] See, Neb. Rev. Stat. §§ 24-1301 to 24-1302 (Cum. Supp. 2006); Nebraska Supreme Court Rule Governing Establishment and Operation of Drug Courts (adopted June 17, 2007).

[46] See, e.g., *State v. Bainbridge*, 249 Neb. 260, 543 N.W.2d 154 (1996); *State v. Jones*, 248 Neb. 117, 532 N.W.2d 293 (1995); *Williams v. County of Buffalo*, 181 Neb. 233, 147 N.W.2d 776 (1967); *Searle v. Yensen*, 118 Neb. 835, 226 N.W. 464 (1929); *State v. Neble*, 82 Neb. 267, 117 N.W. 723 (1908).

Council's petition because the Legislature may not delegate its lawmaking function to the executive or judicial branches.[47]

PETITION DENIED.

[47] See *Clemens v. Harvey*, 247 Neb. 77, 525 N.W.2d 185 (1994).

SHARI ERICKSON AND GEORGE ERICKSON, APPELLANTS, V. U-HAUL INTERNATIONAL, INC., DOING BUSINESS AS U-HAUL COMPANY, ET AL., APPELLEES.

738 N.W.2d 453

Filed September 7, 2007. No. S-05-1163.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue regarding any material fact or the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Jurisdiction: Appeal and Error.** When a jurisdictional question does not involve a factual dispute, the issue is a matter of law. An appellate court reviews questions of law independently of the lower court's conclusion.
4. **Negligence.** The threshold inquiry in any negligence action is whether the defendant owed the plaintiff a duty.
5. ____. Actionable negligence cannot exist if there is no legal duty to protect the plaintiff from injury.
6. ____. Whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular case.
7. **Negligence: Words and Phrases.** A duty, in negligence cases, may be defined as an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another.
8. **Negligence.** When determining whether a legal duty exists for actionable negligence, a court considers (1) the magnitude of the risk, (2) the relationship of the parties, (3) the nature of the attendant risk, (4) the opportunity and ability to exercise care, (5) the foreseeability of the harm, and (6) the policy interest in the proposed solution.
9. ____. The duty of reasonable care generally does not extend to third parties absent other facts establishing a duty.
10. **Negligence: Liability.** The common law has traditionally imposed liability only if the defendant bears some special relationship to the potential victim.
11. **Negligence.** Regardless of whether a duty of reasonable care exists, a duty to warn cannot be imposed absent a special relationship.

12. **Negligence: Liability.** One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be endangered by its probable use, for physical harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier (1) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, (2) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and (3) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous.
13. ____: ____. The words "those whom the supplier should expect to use the chattel" and the words "a person for whose use it is supplied" include not only the person to whom the chattel is turned over by the supplier, but also all those who are members of a class whom the supplier should expect to use it or occupy it or share in its use with the consent of such person, irrespective of whether the supplier has any particular person in mind.
14. **Negligence: Contracts: Tort-feasors.** A contractual relationship between two parties, one of which is a tort-feasor, does not justify the imposition of an affirmative duty upon the other party to the contract to protect a third-party victim with whom no such relationship exists.
15. **Due Process: Jurisdiction: States.** Before a court can exercise personal jurisdiction over a nonresident defendant, the court must determine, first, whether the state's long-arm statute is satisfied. Second, it must determine whether minimum contacts exist between the defendant and the forum state for personal jurisdiction over the defendant without offending due process.
16. **Constitutional Law: Jurisdiction: States.** Nebraska's long-arm statute extends Nebraska's jurisdiction over nonresidents having any contact with or maintaining any relation to this state as far as the U.S. Constitution permits.
17. **Due Process: Jurisdiction: States.** If the long-arm statute has been satisfied, a court must then determine whether minimum contacts exist between the defendant and the forum state for personal jurisdiction over the defendant without offending due process.
18. ____: ____: ____. To subject an out-of-state defendant to personal jurisdiction in a forum court, due process requires that the defendant have minimum contacts with the forum state so as not to offend traditional notions of fair play and substantial justice.
19. ____: ____: ____. The benchmark for determining if the exercise of personal jurisdiction satisfies due process is whether the defendant's minimum contacts with the forum state are such that the defendant should reasonably anticipate being haled into court there.
20. **Jurisdiction: States.** Whether a forum state court has personal jurisdiction over a nonresident defendant depends on whether the defendant's actions created substantial connections with the forum state, resulting in the defendant's purposeful availment of the forum state's benefits and protections.
21. **Due Process: Jurisdiction: States: Appeal and Error.** In analyzing personal jurisdiction, an appellate court considers the quality and type of the defendant's activities to decide whether the defendant has the necessary minimum contacts with the forum state to satisfy due process.

22. **Jurisdiction: States.** Two types of personal jurisdiction may be exercised depending upon the facts and circumstances of the case: general personal jurisdiction or specific personal jurisdiction.
23. ____: ____. To satisfy general personal jurisdiction, the plaintiff's claim does not have to arise directly out of the defendant's contacts with the forum state if the defendant has engaged in continuous and systematic general business contacts with the forum state.

Appeal from the District Court for Douglas County: PATRICIA A. LAMBERTY, Judge. Reversed and remanded for further proceedings.

P. Shawn McCann and Mary M. Schott, of Sodoro, Daly & Sodoro, P.C., for appellants.

Ronald F. Krause and Daniel J. Epstein, of Cassem, Tierney, Adams, Gotch & Douglas, for appellees U-Haul International, Inc., and U-Haul Center of N.W. Omaha.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

CONNOLLY, J.

The appellants, Shari Erickson and her husband, George Erickson, sued U-Haul International, Inc., and U-Haul Center of N.W. Omaha (U-Haul Center). The district court granted U-Haul Center's motion for summary judgment, finding that it owed no duty to the Ericksons. The court also sustained U-Haul International's special appearance because the company did not satisfy the minimum contact requirements for the court to have jurisdiction.

This appeal raises two issues. First, whether, absent any special relationship between a lessor of a vehicle and a third party, the lessor has an affirmative duty to protect the third party from injury. Second, whether U-Haul International had sufficient minimum contacts with Nebraska to make it fair and reasonable to exercise general personal jurisdiction over the company. We conclude that (1) a lessor of a chattel has a duty to warn third-party users of the dangerous condition of the chattel and (2) U-Haul International had sufficient contacts to warrant a Nebraska court's exercise of general personal jurisdiction

over it. We reverse, and remand for further proceedings on the Ericksons' claims.

I. BACKGROUND

1. The Carstens' Rental of the U-Haul Truck

Shari's parents, Dale and Judith Carstens, rented a truck from U-Haul Center to move from Walnut, Iowa, to Herman, Nebraska. The truck, known as a 17-foot easy-loading mover, was licensed in Kentucky.

While operating the truck, Dale attempted to back it up to a porch, but the loading ramp was a few inches short of the top step. Shari held the ramp up while Dale attempted to reverse the truck a few more inches. When the truck was engaged, however, it first jumped forward, throwing Shari off balance, and as Dale backed up the truck, it pinned Shari's foot between the concrete step and the truck's ramp.

In deposition testimony, Shari testified that she did not see any warning labels on the truck instructing that the ramp should not be extended while the truck was in motion. In Judith's deposition, she testified that when she and Dale rented the truck, they did not receive a user's guide with any warnings about using the ramp. After Shari's injury, Judith inspected the truck for warning labels and the only label she found was a partial warning label that was "ragged" and hard to read.

The affidavit of the general manager of U-Haul Center contains a picture that shows a warning sticker below the latch to the truck's rear door stating, "DANGER DO NOT extend or hold ramp while vehicle is in motion. Failure to follow this warning could result in a serious or fatal injury." The affidavit also includes a copy of the "U-Haul Household Moving Van User Instructions," which U-Haul Center alleged that it gives to everyone to whom it rents a truck. On the first page of the instructions is a warning to "**NEVER** put the Household Moving Van in motion while the loading ramp is extended [or] being held."

2. U-Haul International's Contacts With Nebraska

The assistant corporate secretary of U-Haul International in an affidavit, averred that U-Haul International, a Nevada

corporation, has its principal place of business in Phoenix, Arizona; that it did not own the vehicle the Carstens rented; that it was never qualified to do business in Nebraska and did not employ anyone in the state; and that it does not possess any real estate in Nebraska or have a registered agent, maintain any office or bank accounts, conduct any meetings, or perform any kind of services in Nebraska.

U-Haul International, however, is the parent company and owns all of the stock of U-Haul Company of Nebraska (U-Haul Nebraska) and U-Haul Company of Kentucky, which owned the truck involved in the accident. U-Haul Center is a rental center of U-Haul Nebraska. U-Haul International owns the trademark used in Nebraska and displayed on all U-Haul trucks in the state. Also, U-Haul International operates a toll-free telephone number and Web site accessible from Nebraska.

Under the contract it had with U-Haul Nebraska, U-Haul International provided all rental contracts and other forms and stationery for the operation in Nebraska. It was also under contract with U-Haul Nebraska to provide accounting, record-keeping, technical, and advisory services. Finally, it coordinated the exchange of rental equipment between U-Haul Nebraska and other rental centers and prepared all federal and state tax reports.

II. ASSIGNMENTS OF ERROR

The Ericksons assign that the district court erred in (1) finding there was no duty owed by U-Haul Center to the Ericksons and failing to find a foreseeable risk of injury to rental truck users, (2) holding that no genuine issue of material fact exists and granting summary judgment, (3) denying the Ericksons' motion to amend or alter, (4) granting the special appearance of U-Haul International, and (5) failing to recognize the existence of sufficient minimum contacts between the State of Nebraska and U-Haul International.

III. STANDARD OF REVIEW

[1,2] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue regarding any material fact or the ultimate inferences that may

be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[1] In reviewing a summary judgment, we view the evidence in the light most favorable to the party against whom the judgment is granted and give such party the benefit of all reasonable inferences deducible from the evidence.[2]

[3] When a jurisdictional question does not involve a factual dispute, the issue presents a matter of law. We review questions of law independently of the lower court's conclusion.[3]

IV. ANALYSIS

1. Overview of Duty

The district court granted U-Haul Center's motion for summary judgment, finding that U-Haul Center did not owe a duty to Shari. Shari views the matter differently. She contends U-Haul Center owed her a duty because her mother, Judith, rented the truck and her father, Dale, drove it. She argues it was reasonably foreseeable that friends and family would assist Judith and Dale in moving, so a special relationship existed. Shari argues U-Haul Center had a duty to warn of the dangers of using the truck, which extended not just to Judith, who signed the contract, but to all those who used the rental truck.

U-Haul Center counters that for a duty to exist, a relationship must exist between the parties that imposes a legal obligation on one party to protect another party. It argues that because no contractual or special relationship existed between Shari and U-Haul Center, U-Haul Center owed her no duty.

[4-6] The threshold inquiry in any negligence action is whether the defendant owed the plaintiff a duty.[4] Actionable negligence cannot exist if there is no legal duty to protect the plaintiff from

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[1] *Glad Tidings v. Nebraska Dist. Council*, 273 Neb. 960, 734 N.W.2d 731 (2007).

[2] *Id.*

[3] See *Rozsnyai v. Svacek*, 272 Neb. 567, 723 N.W.2d 329 (2006).

[4] *Claypool v. Hibberd*, 261 Neb. 818, 626 N.W.2d 539 (2001).

injury.[5] Whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular case.[6]

[7,8] A duty, in negligence cases, may be defined as an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another.[7] When determining whether a legal duty exists for actionable negligence, a court considers (1) the magnitude of the risk, (2) the relationship of the parties, (3) the nature of the attendant risk, (4) the opportunity and ability to exercise care, (5) the foreseeability of the harm, and (6) the policy interest in the proposed solution.[8]

[9-11] The duty of reasonable care generally does not extend to third parties absent other facts establishing a duty.[9] The common law has traditionally imposed liability only if the defendant bears some special relationship to the potential victim.[10] Regardless of whether a duty of reasonable care exists, a duty to warn cannot be imposed absent a special relationship.[11]

(a) Duty to Warn

[12] The Restatement (Second) of Torts addresses the duty of a supplier of chattels:

> One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be endangered by its probable use, for physical harm caused by the use of the chattel in

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[5] *Danler v. Rosen Auto Leasing*, 259 Neb. 130, 609 N.W.2d 27 (2000).

[6] *National Am. Ins. Co. v. Constructors Bonding Co.*, 272 Neb. 169, 719 N.W.2d 297 (2006).

[7] *Danler v. Rosen Auto Leasing, supra* note 5.

[8] *Munstermann v. Alegent Health*, 271 Neb. 834, 716 N.W.2d 73 (2006).

[9] See, *id.*; *Merrick v. Thomas*, 246 Neb. 658, 522 N.W.2d 402 (1994).

[10] *Popple v. Rose*, 254 Neb. 1, 573 N.W.2d 765 (1998).

[11] *Id.*

> the manner for which and by a person for whose use it is supplied, if the supplier
>
> (a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, and
>
> (b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and
>
> (c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous.[12]

Therefore, under § 388 of the Restatement, a supplier has a common-law duty to warn expected users that a chattel may be dangerous. The comments to § 388 show that the term "supplier" includes lessors. And § 407 of the Restatement specifically extends the duties imposed by § 388 to lessors.[13]

This court has adopted and applied § 388 in finding liability against a manufacturer.[14] In *Libbey-Owens Ford Glass Co. v. L & M Paper Co.*,[15] a corporation purchased a forklift, which overheated and caused a fire. The corporation was unaware that the forklift's resistor coil could heat to 1,200 degrees Fahrenheit. The corporation sued the forklift's manufacturer for the damage caused by the fire. We held that the manufacturer acted negligently because it failed to warn the corporation or the distributor about the forklift's heating propensity. We cited § 388 to support our decision.

We have not applied § 388 to a lessor. Other jurisdictions, however, have found that a lessor of chattels owed a duty to

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[12] Restatement (Second) of Torts § 388 at 300-01 (1965).

[13] *Id.*, § 407, comment *a*.

[14] See *Libbey-Owens Ford Glass Co. v. L & M Paper Co.*, 189 Neb. 792, 205 N.W.2d 523 (1973). See, also, *Driekosen v. Black, Sivalls & Bryson*, 158 Neb. 531, 64 N.W.2d 88 (1954).

[15] *Libbey-Owens Ford Glass Co. v. L & M Paper Co., supra* note 14.

warn of a chattel's dangerous condition.[16] For example, in *Barsness v. General Diesel & Equipment Co.*,[17] a church rented a crane from a construction equipment leasing company. A church member with limited construction experience acted as the general contractor for the project. He attached a manbasket to the crane to lift men for above-ground work. The basket fell while the plaintiff was working in it, and he sustained serious injuries. He sued the leasing company, alleging that the company negligently failed to warn. The trial court granted the leasing company's summary judgment motion.

The North Dakota Supreme Court reversed. It stated that it had recognized a cause of action for failure to warn in cases involving manufacturers. In concluding that a duty may also exist for other suppliers, the court stated: "[W]e see no reason to limit application of the doctrine to manufacturers only. We believe that other suppliers of chattels should be held liable for their negligent failure to warn of dangerous propensities of a chattel supplied to another, as outlined in Section 388."[18] The North Dakota Supreme Court remanded for the trial court to resolve factual issues whether a duty existed.

U-Haul Center contends that Neb. Rev. Stat. § 25-21,239 (Cum. Supp. 2004) has preempted a lessor's liability for leasing a chattel. That statute makes owners of leased trucks, truck-tractors, and trailers liable to persons injured because of the operation of the leased item. Because U-Haul Center does not own the truck that the Carstens leased, § 25-21,239 does not

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[16] See, e.g., *Barsness v. General Diesel & Equipment Co.*, 383 N.W.2d 840 (N.D. 1986); *Rinkleff v. Knox*, 375 N.W.2d 262 (Iowa 1985); *Clark v. Rental Equipment Co. Inc.*, 300 Minn. 420, 220 N.W.2d 507 (1974); *Parra v. Building Erection Services*, 982 S.W.2d 278 (Mo. App. 1998); *Gall v. McDonald Indus.*, 84 Wash. App. 194, 926 P.2d 934 (1996); *Big Three Welding Equipment Company v. Roberts*, 399 S.W.2d 912 (Tex. Civ. App. 1966). See, also, *Jordan v. Carlisle Constr. Co., Inc.*, No. 8:99CV162, 2001 U.S. Dist. LEXIS 24287 (D. Neb. May 3, 2001) (citing § 388 but finding no duty because the lessees were knowledgeable users).

[17] *Barsness v. General Diesel & Equipment Co., supra* note 16.

[18] *Id.* at 845.

apply. The lack of a statutory duty, however, does not prevent us from recognizing a common-law duty of a supplier to protect foreseeable users of its chattels from dangers known to the supplier.

(b) Duty to Third Persons

[13] Section 388 of the Restatement also makes clear that the duty extends to third persons, not just to those in privity of contract with the supplier of the chattel. Comment *a*. provides in part:

> The words "those whom the supplier should expect to use the chattel" and the words "a person for whose use it is supplied" include not only the person to whom the chattel is turned over by the supplier, but also all those who are members of a class whom the supplier should expect to use it or occupy it or share in its use with the consent of such person, irrespective of whether the supplier has any particular person in mind. Thus, one who lends an automobile to a friend and who fails to disclose a defect of which he himself knows and which he should recognize as making it unreasonably dangerous for use, is subject to liability not only to his friend, but also to anyone whom his friend permits to drive the car or chooses to receive in it as passenger or guest, if it is understood between them that the car may be so used.[19]

In *Gall v. McDonald Indus.*,[20] the Washington Court of Appeals applied § 388 to a third person. There, a construction company leased a dump truck. One of the company's employees was driving the truck when its brakes failed and the truck crashed, injuring the employee. The employee sued the leasing company, and the trial court entered summary judgment against him. In reversing the trial court's decision and remanding the cause, the Washington court cited the comments to § 388. The court held that a rational trier of fact could find that the employee was a foreseeable user of the truck, protected under § 388.

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[19] Restatement, *supra* note 12, comment *a*. at 301.

[20] *Gall v. McDonald Indus., supra* note 16.

[14] U-Haul Center cites *Danler v. Rosen Auto Leasing*[21] in support of its argument that it owes no common-law duty to Shari. In *Danler*, we addressed a vehicle-leasing company's duty to a third-party victim. The lessee, while driving the leased vehicle, damaged a third party's parked car; the third party then sued the leasing company.[22] We determined that "[a] contractual relationship between two parties, one of which is a tort-feasor, does not justify the imposition of an affirmative duty upon the other party to the contract to protect a third-party victim with whom no such relationship exists."[23] That is, without a relationship between the leasing company and the third-party motorist, the leasing company had no affirmative duty to protect the third party.

We, however, believe that the rule in *Danler* does not apply here because a fact finder could determine that Shari was a foreseeable user of the leased goods, unlike the third-party victim in *Danler*. The duty owed by U-Haul Center is not to protect Shari from its lessee's negligence, but to protect her from danger stemming from her own use of the leased truck. She, therefore, could fall within the class of protected individuals under § 388.

(c) Genuine Issues of Material Fact Exist Regarding Whether U-Haul Center Had a Duty to Warn Shari

Whether a duty exists under § 388 is a question of law, which depends on several factual determinations. In a case involving a lessor of a crane, the North Dakota Supreme Court stated that a fact finder should resolve the following factual issues in deciding whether a duty to warn arose: (1) For what use was the chattel supplied? (2) Was the chattel dangerous or likely to be dangerous for that use? (3) Did the supplier know or have reason to know of the danger? and (4) Did the supplier have no reason to believe that those who would use the chattel would realize its dangerous condition?[24] The duty also depends on whether Shari

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[21] *Danler v. Rosen Auto Leasing, supra* note 5.

[22] *Id.*

[23] *Id.* at 136, 609 N.W.2d at 32.

[24] See *Barsness v. General Diesel & Equipment Co., supra* note 16.

was a person whom U-Haul Center should expect to use the truck or expect to be endangered by using the truck.

Here, there exist general issues of material fact. The record shows that Shari and the Carstens were using the truck for moving—its intended use. U-Haul Center has a regular practice of providing warnings like handbooks and warning labels on the trucks. This implies that the truck was dangerous for its intended use and that U-Haul Center knew of the danger. Nothing in the record suggests that Shari would realize the dangerous condition absent a warning. Further, U-Haul Center could expect that persons other than the lessee would help in the move, and therefore, use the truck.

Viewing the record in the light most favorable to the Ericksons, we conclude that genuine issues of material fact still exist before the trial court can determine whether, as a matter of law, U-Haul Center had a duty to warn Shari. The district court erred in sustaining U-Haul Center's motion for summary judgment.

2. Nebraska Has Personal Jurisdiction Over U-Haul International

The Ericksons contend the district court erred in not finding that the State of Nebraska has personal jurisdiction over U-Haul International. They argue that U-Haul International had sufficient minimum contacts with Nebraska to establish personal jurisdiction.

(a) Long-Arm Statute

[15,16] Before a court can exercise personal jurisdiction over a nonresident defendant, the court must determine, first, whether the state's long-arm statute is satisfied. Second, it must determine whether minimum contacts exist between the defendant and the forum state for personal jurisdiction over the defendant without offending due process.[25] Nebraska's long-arm statute provides: "A court may exercise personal jurisdiction over a person . . . (2) Who has any other contact with or maintains any other relation to this state to afford a basis for the exercise

[25] See *Brunkhardt v. Mountain West Farm Bureau Mut. Ins.*, 269 Neb. 222, 691 N.W.2d 147 (2005). See, also, *Kugler Co. v. Growth Products Ltd.*, 265 Neb. 505, 658 N.W.2d 40 (2003).

of personal jurisdiction consistent with the Constitution of the United States."[26] Nebraska's long-arm statute, therefore, extends Nebraska's jurisdiction over nonresidents having any contact with or maintaining any relation to this state as far as the U.S. Constitution permits.[27] Therefore, the issue is whether U-Haul International had sufficient contacts with Nebraska so that the exercise of personal jurisdiction would not offend federal principles of due process.[28]

(b) Minimum Contacts

[17-20] If the long-arm statute has been satisfied, a court must then determine whether minimum contacts exist between the defendant and the forum state for personal jurisdiction over the defendant without offending due process.[29] Therefore, we consider the kind and quality of U-Haul International's activities to decide whether it has the necessary minimum contacts with Nebraska to satisfy due process.[30] To subject an out-of-state defendant to personal jurisdiction in a forum court, due process requires that the defendant have minimum contacts with the forum state so as not to offend traditional notions of fair play and substantial justice.[31] The benchmark for determining if the exercise of personal jurisdiction satisfies due process is whether the defendant's minimum contacts with the forum state are such that the defendant should reasonably anticipate being haled into court there.[32] Whether a forum state court has personal jurisdiction over a nonresident defendant depends on whether

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[26] Neb. Rev. Stat. § 25-536 (Reissue 1995).

[27] *Brunkhardt v. Mountain West Farm Bureau Mut. Ins., supra* note 25. See, also, *Diversified Telecom Servs. v. Clevinger*, 268 Neb. 388, 683 N.W.2d 338 (2004).

[28] See *Brunkhardt v. Mountain West Farm Bureau Mut. Ins., supra* note 25.

[29] *Id.* See, also, *Quality Pork Internat. v. Rupari Food Servs.*, 267 Neb. 474, 675 N.W.2d 642 (2004).

[30] *Brunkhardt v. Mountain West Farm Bureau Mut. Ins., supra* note 25.

[31] *Id.*

[32] *Id.*

the defendant's actions created substantial connections with the forum state, resulting in the defendant's purposeful availment of the forum state's benefits and protections.[33]

[21-23] In analyzing personal jurisdiction, we consider the quality and type of the defendant's activities in deciding whether the defendant has the necessary minimum contacts with the forum state to satisfy due process.[34] A court exercises two types of personal jurisdiction depending upon the facts and circumstances of the case: general personal jurisdiction or specific personal jurisdiction. Here, we focus on general personal jurisdiction. To satisfy general personal jurisdiction, the plaintiff's claim does not have to arise directly out of the defendant's contacts with the forum state if the defendant has engaged in "'continuous and systematic general business contacts'" with the forum state.[35]

In finding sufficient contact in a similar case involving U-Haul International, the Alabama Supreme Court held that Alabama had personal jurisdiction over U-Haul International. In *Boyd v. U-Haul Intern., Inc.*,[36] the plaintiff rented a U-Haul truck and lost control of the truck while backing it up to the doorway of his home.[37] The truck crushed a child's foot against concrete steps, and his foot had to be amputated.[38] The court held that U-Haul International had sufficient minimum contacts with Alabama:

> [W]hile U-Haul International does not own the rented vehicles, it serves as a clearinghouse for U-Haul companies throughout the country. It continually collects monies and distributes percentages of those monies to U-Haul

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[33] *Id.*

[34] *Id.*

[35] *Id.* See, also, *Quality Pork Internat. v. Rupari Food Servs., supra* note 29, 267 Neb. at 483, 675 N.W.2d at 650, quoting *Helicopteros Nacionales de Columbia v. Hall*, 466 U.S. 408, 104 S. Ct. 1868, 80 L. Ed. 2d 404 (1984).

[36] *Boyd v. U-Haul Intern., Inc.*, 527 So. 2d 713 (Ala. 1988).

[37] *Id.*

[38] *Id.*

> Company of Alabama. It provides accounting and auditing services to U-Haul Company of Alabama; it provides company forms and stationery; and it maintains standards for repairing and servicing U-Haul vehicles. Moreover, U-Haul International sends its representatives into this State for the express purpose of providing U-Haul Company of Alabama with auditing and accounting services. In light of the foregoing relationship, we conclude that U-Haul International's contacts with Alabama were deliberate rather than fortuitous and, therefore, that it should have been reasonably foreseen that at some time in the future it would need the protections, and would invoke the jurisdiction, of the Alabama courts.[39]

U-Haul International's relationship with U-Haul Company of Alabama looks similar to its relationship with U-Haul Nebraska. U-Haul International contracted with U-Haul Nebraska. The contract not only granted U-Haul Nebraska the exclusive right to have U-Haul rental stores in parts of Nebraska, but also required U-Haul International to provide accounting, record-keeping, technical, and advisory services. The contract required U-Haul International to coordinate the exchange of rental equipment between U-Haul Nebraska and other rental centers. U-Haul International also provided "all rental contracts and other forms and stationery desirable and necessary" for the operations in Nebraska, and prepared all federal and state tax reports. In addition, U-Haul International owns the trademark displayed on all U-Haul trucks used in Nebraska. Finally, U-Haul International operates a toll-free telephone number and Web site accessible from Nebraska. These contacts provide sufficient grounds for a Nebraska court to exercise personal jurisdiction over U-Haul International.

U-Haul International argues that *Boyd* is not binding precedent on this court and that we should instead rely on *Peterson v. U-Haul Co.*[40] In *Peterson*, the Eighth Circuit Court of Appeals found that Nebraska did not have jurisdiction over U-Haul

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[39] *Id.* at 714.

[40] *Peterson v. U-Haul Co.*, 409 F.2d 1174 (8th Cir. 1969).

Company of North Carolina.[41] Unlike U-Haul Company of North Carolina, however, U-Haul International is not one subsidiary within the U-Haul rental system, but is instead the parent corporation. And U-Haul Company of North Carolina's contacts with Nebraska—which arose primarily when one of its trucks was rented to a destination in Nebraska—were less systematic. In contrast, U-Haul International, as the parent corporation, purposely reached into the state to establish an interdependent contractual relationship with U-Haul Nebraska. This relationship resulted in many contacts between U-Haul International and Nebraska. In *Peterson*, no such contractual arrangement existed between U-Haul Nebraska and U-Haul Company of North Carolina for continuous, systematic contact with Nebraska.

Here, U-Haul International, a Nevada corporation, reached out beyond its borders and negotiated with a Nebraska corporation. This contract established a substantial and continuing relationship between U-Haul International and U-Haul Nebraska and committed U-Haul International to having continuing contacts in Nebraska. We are satisfied that the exercise of jurisdiction over U-Haul International would not offend due process. U-Haul International reached into the State of Nebraska, established sufficient minimum contacts, and invoked the benefits and protections of its laws. The district court, therefore, erred in granting U-Haul International's special appearance.

V. CONCLUSION

We conclude that genuine issues of material fact exist regarding whether U-Haul Center had a duty to warn Shari. Also, U-Haul International had sufficient contacts with Nebraska to warrant a Nebraska court's exercise of personal jurisdiction over it. We, therefore, reverse the district court's decision regarding both U-Haul Center's motion for summary judgment and U-Haul International's special appearance, and we remand the cause for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

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[41] *Id.*

TROY NEIMAN AND CAROL LEWIS, SHAREHOLDERS IN TRI R ANGUS, INC., APPELLEES, V. TRI R ANGUS, INC., ET AL., APPELLANTS.

739 N.W.2d 182

Filed September 7, 2007. No. S-06-118.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Statutes: Appeal and Error.** The interpretation of a statute is a question of law for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
4. **Corporations: Actions: Fraud: Proof.** To succeed in an action brought under Neb. Rev. Stat. § 21-2086(1) (Reissue 1997), the prohibited conduct must be proved, and it must be shown that removal of a director is in the best interests of the corporation. More specifically, the district court may remove a director in an action brought by shareholders holding at least 10 percent of the outstanding shares if the court, after reviewing the evidence, finds that the director engaged in fraudulent or dishonest conduct or engaged in a gross abuse of authority or discretion with respect to the corporation and also finds that the removal of the director is in the corporation's best interests.
5. **Corporations: Statutes.** The language of Neb. Rev. Stat. § 21-2086 (Reissue 1997) leads to the conclusion that judicial removal of a director is an extraordinary remedy.
6. **Fraud: Summary Judgment.** A claim of fraud is generally inappropriate for disposition at the summary judgment stage.
7. **Summary Judgment: Proof.** A party moving for summary judgment must make a prima facie case by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence were uncontroverted at trial.
8. ____: ____. If the party moving for summary judgment fails to make a prima facie case, the movant is not entitled to judgment as a matter of law.

Appeal from the District Court for Thomas County: DONALD E. ROWLANDS II, Judge. Reversed and vacated, and cause remanded for further proceedings.

David A. Domina, of Domina Law Group, P.C., L.L.O., and George M. Zeilinger for appellants.

K.C. Engdahl and Karisa D. Johnson, of Ballew, Schneider, Covalt, Gaines & Engdahl, P.C., L.L.O., for appellees.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MILLER-LERMAN, J.

NATURE OF CASE

Appellees, Troy Neiman and Carol Lewis, shareholders in appellant Tri R Angus, Inc. (Tri R), instituted this action in the district court for Thomas County against Tri R and director appellants Jon L. Neiman and Frances E. Neiman (the director appellants), seeking to have the director appellants judicially removed as directors of Tri R. Appellees brought this action pursuant to Neb. Rev. Stat. § 21-2086 (Reissue 1997), which permits the removal of directors by judicial proceeding under certain circumstances. Appellees moved for summary judgment. Following an evidentiary hearing, the district court sustained appellees' motion, ordered the director appellants removed as directors of Tri R, and enjoined them from serving as directors for a period of 2 years. In a subsequent order, the district court denied appellants' "Motion for New Trial" and sustained appellees' motion for further order. In its further order, the court directed Tri R to hold a special shareholders' meeting for the purpose of electing new directors to replace the director appellants and further ruled that the director appellants were not eligible to be elected as directors.

Appellants filed an appeal. We conclude that appellees failed to establish that they were entitled to judgment as a matter of law, and we therefore reverse the district court's entry of summary judgment, vacate the district court's further order entered after the grant of summary judgment, and remand the cause for further proceedings.

STATEMENT OF FACTS

The record reflects that Tri R is a closely held, private corporation in which the director appellants hold approximately 80 percent of the corporation's stock, and appellees hold approximately 12 percent of the stock. The director appellants serve as directors of Tri R. Appellees filed this action with the district court

seeking the judicial removal of the director appellants as Tri R directors pursuant to § 21-2086, which provides as follows:

> (1) The district court of the county where a corporation's principal office, or, if none in this state, its registered office, is located, may remove a director of the corporation from office in a proceeding commenced either by the corporation or by its shareholders holding at least ten percent of the outstanding shares of any class if the court finds that (a) the director engaged in fraudulent or dishonest conduct or gross abuse of authority or discretion with respect to the corporation and (b) removal is in the best interests of the corporation.
>
> (2) The court that removes a director may bar the director from reelection for a period prescribed by the court.
>
> (3) If shareholders commence a proceeding under subsection (1) of this section, they shall make the corporation a party defendant.

In their complaint filed on May 18, 2005, appellees alleged, inter alia, that the director appellants, as directors of Tri R, authorized the distribution of assets in violation of state law, inappropriately mortgaged or pledged corporate assets, inappropriately sold or disposed of corporate assets, inappropriately diverted and utilized corporate earnings, and wasted corporate assets. Appellants filed an answer generally denying the allegations in the complaint.

On September 8, 2005, appellees filed a motion for summary judgment. An evidentiary hearing was held, and evidence was adduced by appellees. The director appellants did not introduce evidence in opposition to appellees' motion for summary judgment.

In an order filed December 5, 2005, the district court sustained appellees' motion and ordered the removal of the director appellants. In its order, the district court stated that its

> ruling [was] based in part upon the decision entered by . . . the Lincoln County District Court [in the] case of *Tri R. Angus, Inc. v. Neiman and Neiman Corp. et al.* [and upon] the orders [of the] United States Bankruptcy Court for the District of Nebraska involving the Chapter 11

> Bankruptcy proceedings of [Tri R] as well as [of the director appellants].

We note that the ruling from the Lincoln County District Court upon which the summary judgment in the instant case was based resolved litigation that had been initiated in 2001, involving events that had occurred primarily between 1998 and 2001, and that the bankruptcy court orders also relied on had been entered in 2003 and largely consisted of rulings dismissing the bankruptcy proceedings for failure to comply with bankruptcy court orders that directed the filing of amended bankruptcy schedules and operating reports and for failure to make an adequate protection payment in a timely manner. In its order filed December 5, 2005, the district court ordered that the director appellants be removed as directors of Tri R and further enjoined the director appellants from serving as Tri R directors for a period of 2 years.

Following the district court's order sustaining appellees' motion for summary judgment, appellants filed a "Motion for New Trial" and appellees filed a motion for further order. In an order filed January 19, 2006, the district court denied appellants' motion and sustained appellees' motion, setting a date for a shareholders' meeting to hold elections to fill the vacancies and prohibiting the director appellants from seeking election as directors. Appellants filed this appeal.

ASSIGNMENTS OF ERROR

On appeal, appellants assign various errors. In summary, appellants claim that the district court for Thomas County (1) lacked jurisdiction to decide this case because Tri R's principal office is located in Cherry County and not in Thomas County, (2) erred in entering summary judgment in favor of appellees, and (3) erred in sustaining appellees' motion for further order.

STANDARDS OF REVIEW

[1,2] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Alston v. Hormel Foods Corp.*,

273 Neb. 422, 730 N.W.2d 376 (2007). In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Id.*

[3] The interpretation of a statute is a question of law for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *Reid v. Evans*, 273 Neb. 714, 733 N.W.2d 186 (2007).

ANALYSIS

Appellees Filed Their Action in the Appropriate District Court.

For their first assignment of error, appellants claim that the district court lacked authority to hear the instant case. In support of this argument, appellants rely upon § 21-2086(1), which, in pertinent part, provides that "[t]he district court of the county where a corporation's principal office, or, if none in this state, its registered office, is located, may remove a director of the corporation from office . . . ." Appellants claim that this statutory provision is jurisdictional and argue that Tri R's principal office is located in Cherry County, not Thomas County, and that therefore, the district court for Thomas County lacked jurisdiction to hear the instant case.

We determine that, without regard to whether § 21-2086(1) is jurisdictional in nature, the evidence in the record demonstrates that Tri R's principal office is located in Thomas County, where the action was filed, and that thus, the district court for Thomas County was authorized under the statute to hear the present action.

The record on appeal contains copies of Tri R's corporate bylaws. The bylaws provide that Tri R's principal office is located in Thomas County, a fact that counsel for appellants acknowledged at oral argument. Nothing in the record indicates that the bylaws have been amended relative to the principal office. Principal office is defined as "the office, in or out of this state, so designated in the annual report where the principal executive offices of a domestic or foreign corporation are located." Neb. Rev. Stat. § 21-2014(15) (Reissue 1997). In

challenging the filing of this action in Thomas County, appellants have not directed this court to any annual reports located in the record that designated Tri R's principal office.

The record does not contain meaningful evidence that the principal office is located in a county other than Thomas County. Given the record, we conclude that there is no merit to appellants' first assignment of error.

The District Court Erred in Granting Appellees' Motion for Summary Judgment Because Appellees Failed to Establish That They Were Entitled to Judgment as a Matter of Law.

For their second assignment of error, appellants claim, for a variety of reasons, that the district court erred in entering summary judgment in favor of appellees. Taking into consideration the provisions of § 21-2086(1) and the record in this case, we conclude that appellees failed to establish that they were entitled to judgment as a matter of law and that therefore, the district court erred in sustaining appellees' motion for summary judgment. We reverse the district court's entry of summary judgment, and, as discussed in the last section of this opinion, vacate its further order of January 19, 2006, and remand the cause for further proceedings.

[4] This case seeking the judicial removal of directors was brought under § 21-2086(1), which provides as follows:

> The district court of the county where a corporation's principal office, or, if none in this state, its registered office, is located, may remove a director of the corporation from office in a proceeding commenced either by the corporation or by its shareholders holding at least ten percent of the outstanding shares of any class if the court finds that (a) the director engaged in fraudulent or dishonest conduct or gross abuse of authority or discretion with respect to the corporation and (b) removal is in the best interests of the corporation.

To succeed in an action brought under § 21-2086(1), the prohibited conduct must be proved, and it must be shown that removal of a director is in the best interests of the corporation. More specifically, the district court may remove a director in an action brought by shareholders holding at least 10 percent of

the outstanding shares if the court, after reviewing the evidence, finds that the director engaged in fraudulent or dishonest conduct or engaged in a gross abuse of authority or discretion with respect to the corporation and also finds that the removal of the director is in the corporation's best interests.

This court has not had occasion to consider the requirements for judicial removal of corporate directors under the provisions of § 21-2086, which was enacted in 1995. The Statement of Intent relative to the bill that introduced § 21-2086 indicates that the provisions of the bill are based on the Model Business Corporation Act (MBCA) and that the "intent [of the bill] is to fine-tune our corporate law to insure [sic] that it is meeting the needs of Nebraska businesses and creating an attractive environment in which corporations may be formed." L.B. 109, Banking, Commerce and Insurance Committee, 94th Leg., 1st Sess. (Jan. 23, 1995).

Appellants assert, and appellees do not dispute, that § 21-2086 is based upon MBCA § 8.09. See 2 Model Business Corporation Act Ann. § 8.09 (3d ed. 2002). Other states have enacted statutes based on MBCA § 8.09 that are comparable to § 21-2086. See, e.g., Ariz. Rev. Stat. Ann. § 10-809 (2004); Colo. Rev. Stat. Ann. § 7-108-109 (West 2006); Iowa Code Ann. § 490.809 (West Cum. Supp. 2007); N.Y. Bus. Corp. Law § 706 (McKinney 2003). However, we are not aware of, and the parties have not directed us to, decisions of courts in other jurisdictions that have provisions similar to § 21-2086 that are useful in determining how to apply the provisions of the Nebraska statute in the instant case.

We are aware that § 8.09 of the MBCA has been amended, and although the amendments have not been incorporated into the Nebraska statutory provision, comments made by the Committee on Corporate Laws of the Section of Business Law, which from time to time proposes changes to the MBCA, are instructive as to the drafters' intent behind the original provisions that form the basis of § 21-2086. The committee has observed that

> [t]he grounds for removal in the present statute ("the director engaged in fraudulent or dishonest conduct, or gross abuse of authority or discretion, with respect to the corporation,") are vague, insufficient to distinguish more from

> less serious misbehavior, provide inadequate guidance for the exercise of the court's discretion, and may therefore be susceptible to abuse.

See Committee on Corporate Laws of the Section of Business Law, *Changes in the Model Business Corporation Act—Proposed Amendments Relating to Directors*, 56 Bus. Law. 85-86 (2000). More particularly, the official comment to the amended section states that

> [s]ection 8.09 is designed to operate in the limited circumstance where other remedies are inadequate to address serious misconduct by a director . . . . Misconduct serious enough to justify the extraordinary remedy of judicial removal does not involve any matter falling within an individual director's lawful exercise of business judgment, no matter how unpopular the director's views may be . . . .

See Committee on Corporate Law of the Section of Business Law, *supra* at 90.

In addition to this comment, commentators in states that have enacted statutory versions of § 8.09 have similarly discussed the extreme and limited nature of the remedy with respect to the conduct and the resultant harm to the corporation that would justify removal. One commentator has noted that the bar for removal

> is a high standard, requiring gross, intentional, or dishonest conduct [and e]ven if that standard is met, the director still cannot be removed unless the removal is in the best interests of the corporation. Clearly, the drafters of this statute wished to make it possible, but difficult, for a court to remove a director.

See 1 Cathy Stricklin Krendl et al., Methods of Practice § 1.62 (Colo. Prac. Series, 6th ed. 2005) (discussing Colo. Rev. Stat. Ann. § 7-108-109, Colorado's statutory version of MBCA § 8.09). In addition to noting the "high standard" established by the statute, legal commentators have discussed the elements the shareholder must prove in order to obtain judicial removal of a director, stating that

> [i]n an action to remove a director under statutory provisions, the plaintiff has the burden of proving . . . all of the elements of the cause of action. . . . The most difficult

> element in the plaintiff's case will usually be to establish the acts of the defendant director being relied upon as a ground for removal. The plaintiff may call the defendant and other corporate officers to testify as to the acts or transactions complained of, but in most cases, the plaintiff will have to conduct considerable discovery proceedings and obtain from the corporate records as much evidentiary matter as possible.

14A N.Y. Jur. 2d *Business Relationships* § 567 (1996) (discussing N.Y. Bus. Corp. Law § 706, New York's statutory version of MBCA § 8.09).

[5] The interpretation of a statute is a question of law for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *Reid v. Evans*, 273 Neb. 714, 733 N.W.2d 186 (2007). The language of Nebraska's version of MBCA § 8.09, § 21-2086, leads us to conclude, as have others considering MBCA § 8.09, that judicial removal of a director is an extraordinary remedy. It is not a remedy to be judicially awarded when there is merely a difference of opinion between the shareholders and the directors regarding the operations of the corporation encompassed by the exercise of business judgment. Instead, it is an unusual remedy that is to be granted only upon the shareholder's production of sufficient evidence demonstrating that the director has engaged in "fraudulent or dishonest conduct or gross abuse of authority or discretion with respect to the corporation." § 21-2086.

[6] By including "fraudulent" conduct in the list of conduct that justifies judicial removal of directors, we believe that § 21-2086 as a whole evinces a high bar for removal. *City of Gordon v. Ruse*, 268 Neb. 686, 690, 687 N.W.2d 182, 185 (2004) (stating that "[t]o determine the legislative intent of a statute, a court generally considers the subject matter of the whole act, as well as the particular topic of the statute containing the questioned language"). The elements for establishing fraud can commonly include a requirement that the actor whose conduct is challenged had the requisite knowledge that his or her conduct was unacceptable or his or her representations were false. *Nielsen v. Adams*, 223 Neb. 262, 388 N.W.2d 840 (1986) (citing W. Page Keeton et al., Prosser & Keeton on the Law of

Torts § 105 (5th ed. 1984)). In connection with a complaint for securities fraud, we note that in *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 127 S. Ct. 2499, 168 L. Ed. 2d 179 (2007), the U.S. Supreme Court recently discussed the heightened pleading requirement of facts evidencing scienter required by the Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 78u-4(b)(2) (2000) (§ 21D(b)(2)). Specifically, under § 21D(b)(2), plaintiffs must "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." Consistent with the foregoing, in discussing fraud, we have previously noted that scienter, as an aspect of the knowledge requirement of fraud, involves inferences going to the defendant's state of mind, and we have further observed that the defendant's state of mind is difficult to prove. *Nielsen v. Adams, supra*. As a result, not surprisingly, it has been observed that a claim of fraud is generally inappropriate for disposition at the summary judgment stage. See, *Mitchell v. Calhoun*, 229 Ga. 757, 194 S.E.2d 421 (1972); *Great So. Nat. v. McCullough Env. Serv.*, 595 So. 2d 1282 (Miss. 1992); *Lacy v. Morrison*, 906 So. 2d 126 (Miss. App. 2004); *Hooks v. Eckman*, 159 N.C. App. 681, 587 S.E.2d 352 (2003).

In *Tellabs, Inc.*, the U.S. Supreme Court noted that the various tests applicable to pleadings, summary judgments, and posttrial judgments are different and that "the test at each stage is measured against a different backdrop." 551 U.S. at 325 n.5. We, of course, agree that the tests differ at different stages of the litigation. In the instant appeal, we are asked to rule on the propriety of a summary judgment entered in favor of appellees based on a collection of documents that in and of themselves do not unequivocally demonstrate that the director appellants had the required state of mind and that the director appellants engaged in fraudulent conduct. For the present purpose of reviewing a summary judgment, we must view the evidence in a light most favorable to the party against whom the judgment is entered and give such party the benefit of all reasonable inferences deducible from the evidence. See *Alston v. Hormel Foods Corp.*, 273 Neb. 422, 730 N.W.2d 376 (2007).

Giving the inferences in favor of the director appellants, as we must, we cannot say at the summary judgment stage that

appellees established that the director appellants engaged in fraudulent or dishonest conduct. See § 21-2086(1). By extension, and without regard to the knowledge requirement of fraud, we also believe that, taking the inferences in favor of the director appellants, the record on summary judgment fails to establish as a matter of law that the director appellants have necessarily engaged in gross abuse of authority or discretion with respect to the corporation. See *id*. Finally, we also believe that because judicial removal of directors is a remedy designed, in part, to prevent future abuse, the acts complained of should be relatively recent. See Olga N. Sirodoeva-Paxson, *Judicial Removal of Directors: Denial of Directors' License to Steal or Shareholders' Freedom to Vote?* 50 Hastings L.J. 97 (1998). As noted below, we also determine that the tendered evidence does not satisfy this requirement.

The record in the instant case consists of thousands of pages of documents. Aside from procedural affidavits from counsel, which identify the documents tendered into evidence, appellees have provided little guidance to this court with regard to the significance of these documents or the relationship between these documents and the requirements of § 21-2086(1). Our review of the evidence shows that the exhibits consist primarily of copies of pleadings and materials filed in other litigation involving Tri R, as well as copies of materials filed in Tri R's and the director appellants' chapter 11 bankruptcy proceedings. The acts reflected in the other cases are invariably several years old, dating from 2003 or earlier. There is no objective evidence of current conduct by the director appellants that meets the high bar to establish the conduct required under the statute. Further, there is no objective evidence that the older conduct requires removal or that removal is in the best interests of the corporation. See *Medlock v. Medlock*, 263 Neb. 666, 642 N.W.2d 113 (2002) (commenting on inutility of stale evidence). For completeness, we note that the record does contain the November 2005 affidavit of appellee Troy Neiman relating to his observations relative to the condition of certain Tri R property, made after an aerial inspection. This affidavit is insufficient to establish that appellees were entitled to judgment as a matter of law.

[7,8] We have considered the evidence offered by appellees at the summary judgment hearing in light of the requirements of § 21-2086(1) discussed above to determine the propriety of the district court's ruling granting summary judgment. A party moving for summary judgment must make a prima facie case by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence were uncontroverted at trial. *Pogge v. American Fam. Mut. Ins. Co.*, 272 Neb. 554, 723 Neb. 334 (2006). If the moving party fails to make a prima facie case, the movant is not entitled to judgment as a matter of law. See *New Tek Mfg. v. Beehner*, 270 Neb. 264, 702 N.W.2d 336 (2005). In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Alston v. Hormel Foods Corp.*, 273 Neb. 422, 730 Neb. 376 (2007).

Applying the foregoing principles, appellees were not entitled to judgment as a matter of law, and the district court erred in granting appellees' motion for summary judgment. We reverse the district court's order granting summary judgment in favor of appellees and remand the cause for further proceedings.

The District Court's Order Entered on Appellees' Motion for Further Order Must Be Vacated.

Appellants' final assignment of error challenges the propriety of the district court's order of January 19, 2006, granting appellees' motion for further order, in which the district court set a date for a shareholders' meeting to hold elections to fill the director vacancies and prohibited the director appellants from seeking election as directors. In view of our reversal of the summary judgment entered in favor of appellees, it necessarily follows that this subsequent relief afforded by the district court granting appellees' motion for further relief was error and must be vacated.

CONCLUSION

In this action seeking judicial removal of directors under § 21-2086, appellees failed to establish that they were entitled

to judgment as a matter of law, and therefore, the district court erred when it granted appellees' motion for summary judgment and ordered the removal of the director appellants as directors. The district court's judgment entered in favor of appellees on their motion for summary judgment is reversed. The district court's further order directing a shareholders' meeting is vacated. The cause is remanded for further proceedings.

REVERSED AND VACATED, AND CAUSE REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. JAY ROBERT GARROUTTE, RESPONDENT.

739 N.W.2d 191

Filed September 21, 2007. No. S-07-639.

Original action. Judgment of disbarment.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

PER CURIAM.

INTRODUCTION

This case is before the court on the voluntary surrender of license filed by respondent, Jay Robert Garroutte. The court accepts respondent's surrender of his license and enters an order of disbarment.

FACTS

Respondent was admitted to the practice of law in the State of Nebraska on September 25, 1991. On June 12, 2007, an application for the temporary suspension of respondent from the practice of law was filed by the chairperson of the Committee on Inquiry of the First Disciplinary District. The application stated that on March 27, 2007, in the district court for Polk County, Iowa, respondent pled guilty to felony criminal charges of manufacturing a controlled substance, in violation of Iowa Code Ann. § 124.401(1)(d) (West 2007), and failure to possess a tax stamp,

in violation of Iowa Code Ann. § 453B.12 (West 2006). The application further stated that on May 15, the district court found respondent guilty of the charges, sentenced him to prison for 5 years, and imposed a fine. The application further stated that

> respondent has engaged in . . . criminal [behavior] that reflects adversely on his honesty, trustworthiness or fitness as a lawyer in other respects and that if he [is] allowed to continue to practice law until final disposition of the . . . disciplinary proceedings, it would cause serious damage to the reputation of the legal profession and could cause damage to the public.

On June 20, 2007, this court entered an order directing respondent to show cause why his license should not be temporarily suspended. A copy of the show cause order was served on respondent. On August 29, this court determined that respondent had failed to show cause why his license should not be temporarily suspended and ordered respondent's license to practice law in the State of Nebraska temporarily suspended until further order of the court.

Respondent has filed with this court a voluntary surrender of license, voluntarily surrendering his license to practice law in the State of Nebraska. In his voluntary surrender of license, respondent effectively does not challenge or contest the truth of the allegations in the application for temporary suspension to the effect that he pled guilty to felony criminal charges of manufacturing a controlled substance and failure to possess a tax stamp and, further, that the district court found respondent guilty of the charges, sentenced him to prison for 5 years, and imposed a fine. In addition to surrendering his license, respondent effectively consented to the entry of an order of disbarment and waived his right to notice, appearance, and hearing prior to the entry of the order of disbarment.

ANALYSIS

Neb. Ct. R. of Discipline 15 (rev. 2001) provides in pertinent part:

> (A) Once a Grievance, a Complaint, or a Formal Charge has been filed, suggested, or indicated against a member, the member may voluntarily surrender his or her license.

> (1) The voluntary surrender of license shall state in writing that the member knowingly admits or knowingly does not challenge or contest the truth of the suggested or indicated Grievance, Complaint, or Formal Charge and waives all proceedings against him or her in connection therewith.

Pursuant to rule 15, we find that respondent has voluntarily surrendered his license to practice law and knowingly does not challenge or contest the truth of the allegations made against him in the application for temporary suspension. Further, respondent has waived all proceedings against him in connection therewith. We further find that respondent has consented to the entry of an order of disbarment.

CONCLUSION

Upon due consideration of the court file in this matter, the court finds that respondent voluntarily has stated that he knowingly does not challenge or contest the truth of the allegations in the application for temporary suspension to the effect that he pled guilty to felony criminal charges of manufacturing a controlled substance and failure to possess a tax stamp and that the district court found respondent guilty of the charges, sentencing him to prison and imposing a fine. The court accepts respondent's surrender of his license to practice law, finds that respondent should be disbarred, and hereby orders him disbarred from the practice of law in the State of Nebraska, effective immediately. Respondent shall forthwith comply with all terms of Neb. Ct. R. of Discipline 16 (rev. 2004), and upon failure to do so, he shall be subject to punishment for contempt of this court. Accordingly, respondent is directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 1997) and Neb. Ct. R. of Discipline 10(P) (rev. 2005) and 23 (rev. 2001) within 60 days after an order imposing costs and expenses, if any, is entered by the court.

JUDGMENT OF DISBARMENT.

GAIL FICKLE, BOTH INDIVIDUALLY AND AS PARENT AND GUARDIAN OF JACOB WAGNER, APPELLEE AND CROSS-APPELLANT, V. STATE OF NEBRASKA, APPELLANT AND CROSS-APPELLEE.

759 N.W.2d 113

Filed September 28, 2007. No. S-04-1250.

SUPPLEMENTAL OPINION

Appeal from the District Court for Colfax County: MARY C. GILBRIDE, Judge. Supplemental opinion: Former opinion modified. Motion for rehearing overruled.

Jon Bruning, Attorney General, Michele M. Lewon, and Matthew F. Gaffey for appellant.

Douglas J. Peterson and Joel Bacon, of Keating, O'Gara, Nedved & Peter, P.C., L.L.O., for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

PER CURIAM.

Case No. S-04-1250 is before us on the motion for rehearing filed by the State of Nebraska, appellant, regarding our opinion reported at *Fickle v. State*, 273 Neb. 990, 735 N.W.2d 754 (2007). We overrule the motion, but for purposes of clarification, modify the opinion as follows:

That portion of the opinion designated "(a) Future Economic Damages," *id.* at 1008-11, 735 N.W.2d at 771-73, is withdrawn, and the following language is substituted in its place:

> (a) Future Economic Damages
>
> Fickle asserts that the amount of future economic damages awarded was inadequate. At the time of trial, Wagner was 20 years old. George Wolcott, a neurologist, testified that Wagner could expect to live "into his 60's." The evidence established that Wagner's life expectancy from the time of trial was approximately 40 years. Fickle claims that Wagner's future medical care and loss of wages require a much greater award than was given by the district court.

(i) Future Medical Care

The evidence established that Wagner's future medical expenses (including the cost of residential care at Village Northwest Unlimited) would be between $193,610 and $198,355 per year. This range did not reflect inflation or future increases in cost. These amounts were shown in a "Life Care Plan" compiled by Robin Welch-Shaver. Welch-Shaver has a bachelor of science degree in nursing and is a certified life care planner. The plan was formulated using information from Fickle, Wagner, the providers at Village Northwest Unlimited, and Drs. Wolcott, Lester Sach, Sarah Zoelle, and Lyal Leibrock.

The life care plan considered that Wagner would remain a resident of Village Northwest Unlimited, which provided appropriate treatment, including 24-hour nursing care, physical and occupational therapy, cognitive-skills training, and other services. The plan also was based upon the fact that Wagner would always need a residential setting in which he would receive services similar to those he was receiving from Village Northwest Unlimited. The cost associated with Wagner's need for this residential setting was $462 per day, which equated to an annual cost of $168,630.

Evidence at trial suggested that Wagner had been receiving Medicaid payments and that Village Northwest Unlimited was charging him at the Medicaid rate, which was lower than the rate paid by private parties. The State argues that the lower Medicaid rate should have been considered in calculating damages instead of the private-party rate. This argument has no merit.

[24,25] The private-party rate, not the Medicaid rate, is the proper rate to use in calculating Wagner's future medical expenses. Under the collateral source rule, the fact that the party seeking recovery has been wholly or partially indemnified for a loss by insurance or otherwise cannot be set up by the wrongdoer in mitigation of damages. *Mahoney v. Nebraska Methodist Hosp.*, 251 Neb. 841, 560 N.W.2d 451 (1997). Social legislation benefits, including payments by Medicare and Medicaid, are excluded by the

collateral source rule. See, *Bynum v. Magno*, 106 Haw. 81, 101 P.3d 1149 (2004) (holding that collateral source rule prohibited reducing patient's damages award to reflect discounted Medicare and Medicaid payments); Restatement (Second) of Torts § 920A, comment *c*. (1979). Moreover, once Fickle receives the judgment awarded in this case, Wagner may no longer be eligible for Medicaid (or Village Northwest Unlimited's Medicaid rate), because eligibility standards take into account the resources available to a Medicaid applicant or recipient. See *Wilson v. Nebraska Dept. of Health & Human Servs.*, 272 Neb. 131, 718 N.W.2d 544 (2006).

The State also claims that certain medical expenses should not be included because they were controverted at trial. For instance, the State points out that Wagner was not required to take the following medications and supplements as a result of the accident: "Aterol," multivitamins, and calcium supplements. It further argues that the cost of future neurologic and urologic treatment should not have been included in the Life Care Plan because there was insufficient medical evidence that such care would be necessary. The State also asserts that the cost of a motorized wheelchair should not be included as a future medical expense because one of his physicians testified that he should continue to use a manual wheelchair. The State further claims that the projected cost of a customized minivan to accommodate Wagner's special needs should not have included the base cost of the vehicle before customization. Excluding all of the items of future medical expense which the State contests, there remains essentially uncontroverted evidence that Wagner's future medical expenses without adjustment for inflation will be between $7,398,320 and $7,493,120.

(ii) Lost Earning Capacity

Evidence showed that Wagner was unable to earn a living in the labor market due to his injuries. At trial, the State contested whether Wagner would have been a skilled laborer. At the time of the accident, Wagner was

a high school student who had difficulties in school and whose academic performance was not stellar. He planned to obtain a diploma through GED and pursue training through Job Corps to acquire a skill. Fickle argues that the evidence presented indicated that even if Wagner did not complete vocational training or obtain a diploma through GED, he could have expected to make at least $8 per hour as an unskilled laborer. A laborer working at this rate would earn a minimum of $16,000 per year. Over a period of 40 years, Wagner's earnings would amount to at least $640,000.

The State argues that Wagner's potential earnings should have been based upon the minimum wage. But the State fails to direct us to evidence in the record indicating that minimum wage was all that Wagner could have expected to earn. The record does not support a reasonable inference that Wagner's future earning capacity over his 40-year life expectancy was less than $640,000.

(iii) Total Future Economic Damages

There is competent and essentially uncontroverted evidence that future medical expenses for Wagner would be between $7,398,320 and $7,493,120 over a 40-year life expectancy and that he sustained a loss of future earning capacity of at least $640,000. Thus, without consideration for inflation, the evidence presented at trial established Wagner's future economic damages would be between $8,038,320 and $8,133,120.

(iv) Reduction to Present Value

[26,27] The general rule in Nebraska is that an award for future damages must be reduced to its present value. *Cassio v. Creighton University*, 233 Neb. 160, 446 N.W.2d 704 (1989). Present value is the current worth of a certain sum of money due on a specified future date after taking interest into consideration. *Thiltges v. Thiltges*, 247 Neb. 371, 527 N.W.2d 853 (1995).

Present value must be determined because the money awarded can be invested and earn interest. A present

award should also consider the fact that inflation will increase the expenses incurred by the plaintiff. Although the plaintiff can earn interest, the value of the dollar will decline because of inflation. See, generally, G. Michael Fenner, *About Present Cash Value*, 18 Creighton L. Rev. 305 (1985) (discussing various approaches for determining present value). These factors are left to the judgment of the trial court but should, nevertheless, be considered in the amount of the award.

(v) Conclusion Regarding Future Economic Damages

Giving the State the benefit of reasonably disputed items, we conclude that future economic damages proved at trial are far in excess of the amount awarded by the district court. Therefore, the award for economic damages did not bear a reasonable relationship to the damages proved at trial.

The remainder of the opinion shall remain unmodified.

FORMER OPINION MODIFIED.
MOTION FOR REHEARING OVERRULED.

STATE OF NEBRASKA, APPELLEE, V.
DANIEL LEE JONES, APPELLANT.
739 N.W.2d 193

Filed September 28, 2007. No. S-06-798.

1. **Criminal Law: Courts: Juvenile Courts: Jurisdiction: Appeal and Error.** A trial court's denial of a motion to transfer a pending criminal proceeding to the juvenile court is reviewed for an abuse of discretion.
2. **Effectiveness of Counsel: Proof.** To prevail on a claim of ineffective assistance of counsel, the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense.
3. **Effectiveness of Counsel: Records: Appeal and Error.** Claims of ineffective assistance of counsel raised for the first time on direct appeal do not require dismissal ipso facto; the determining factor is whether the record is sufficient to adequately review the question. When the issue has not been raised or ruled on at the trial court level and the matter necessitates an evidentiary hearing, an appellate court will not address the matter on direct appeal.

4. **Courts: Juvenile Courts: Jurisdiction.** In determining whether a case should be transferred to juvenile court, a court should consider those factors set forth in Neb. Rev. Stat. § 43-276 (Reissue 1998). In order to retain the proceedings, the court does not need to resolve every factor against the juvenile; moreover, there are no weighted factors and no prescribed method by which more or less weight is assigned to each specific factor. It is a balancing test by which public protection and societal security are weighed against the practical and nonproblematical rehabilitation of the juvenile.

Appeal from the District Court for Sarpy County: DAVID K. ARTERBURN, Judge. Affirmed.

Mark A. Weber and Kylie A. Wolf, of Walentine, O'Toole, McQuillan & Gordon, for appellant.

Jon Bruning, Attorney General, and James D. Smith for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

HEAVICAN, C.J.

INTRODUCTION

Daniel Lee Jones pled no contest to first degree murder in the stabbing death of Scott Catenacci and was sentenced to life imprisonment. After obtaining a new direct appeal through a postconviction action, Jones appeals his conviction. The primary issue presented by this appeal is whether the district court abused its discretion by not transferring Jones' case to juvenile court. We are additionally presented with the question of whether Jones' trial counsel was ineffective for recommending that Jones plead no contest to first degree murder.

FACTUAL BACKGROUND

Jones was charged by information with first degree murder and use of a weapon to commit a felony in the death of Catenacci. The information alleged that Catenacci was murdered on or about September 29, 1998. Jones, whose date of birth is November 7, 1981, was nearly 17 years of age at the time of Catenacci's death. Jones filed several pretrial motions, including one requesting a transfer to juvenile court. His transfer motion was denied by the district court.

On March 29, 1999, as part of a plea agreement, Jones pled no contest to first degree murder in return for the dismissal of the use of a weapon charge. On June 28, Jones was sentenced to life imprisonment. Jones' first appeal was dismissed for failure to pay the statutory docket fee.[1] Jones obtained a new direct appeal through a postconviction action and now appeals his conviction and sentence.

At Jones' plea hearing, the State provided the following factual basis for the plea:

> On or about the 29th day of September, 1998, at or near 2300 River Road, in Sarpy County, Nebraska — which is kind of a shrub and timber area adjacent to Haworth Park in Bellevue — the defendant . . . Jones, in concert with other defendants[,] attacked and stabbed to death Scott Catenacci. And the State would at the time of trial prove that this was a premeditated and deliberate and malicious attack, and that it had been discussed several days beforehand, and that . . . Jones stabbed . . . Catenacci several times, and that he died as a result of those stab wounds.

At this hearing, Jones acknowledged he "had knowledge enough of the plan that there was to be an attack on Scott Catenacci with knives." Jones did, however, dispute the contention that he was involved in the planning of the attack.

ASSIGNMENTS OF ERROR

On appeal, Jones assigns that (1) he received ineffective assistance of counsel when counsel advised him to plead no contest to first degree murder and (2) the district court erred in not transferring the case to juvenile court.

STANDARD OF REVIEW

[1] A trial court's denial of a motion to transfer a pending criminal proceeding to the juvenile court is reviewed for an abuse of discretion.[2]

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[1] *State v. Jones*, 258 Neb. xxii (No. S-99-957, Nov. 10, 1999).

[2] *State v. McCracken*, 260 Neb. 234, 615 N.W.2d 902 (2000), *abrogated on other grounds, State v. Thomas*, 262 Neb. 985, 637 N.W.2d 632 (2002).

ANALYSIS

Ineffective Assistance of Counsel.

In his first assignment of error, Jones argues that his counsel was ineffective for recommending that Jones plead no contest to first degree murder when there was evidence that his actions did not rise to the level of first degree murder. In response, the State asserts that the record is not adequate to review Jones' ineffective assistance claim.

[2,3] To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*,[3] the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense.[4] Claims of ineffective assistance of counsel raised for the first time on direct appeal do not require dismissal ipso facto; the determining factor is whether the record is sufficient to adequately review the question. When the issue has not been raised or ruled on at the trial court level and the matter necessitates an evidentiary hearing, an appellate court will not address the matter on direct appeal.[5]

We concur with the State that this record is not sufficient to address Jones' claim of ineffective assistance of counsel. We therefore do not further address Jones' first assignment of error.

Motion to Transfer to Juvenile Court.

[4] In his second assignment of error, Jones argues that the district court erred in not transferring his case to juvenile court. A trial court's denial of a motion to transfer a pending criminal proceeding to the juvenile court is reviewed for an abuse of discretion.[6] In determining whether a case should be transferred, a court should consider those factors set forth in Neb. Rev. Stat.

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[3] *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

[4] *State v. Moyer*, 271 Neb. 776, 715 N.W.2d 565 (2006).

[5] *State v. York*, 273 Neb. 660, 731 N.W.2d 597 (2007).

[6] *State v. McCracken, supra* note 2.

§ 43-276 (Reissue 1998).[7] In order to retain the proceedings, the court does not need to resolve every factor against the juvenile; moreover, there are no weighted factors and no prescribed method by which more or less weight is assigned to each specific factor. It is a balancing test by which public protection and societal security are weighed against the practical and nonproblematical rehabilitation of the juvenile.[8]

Section 43-276 requires consideration of the following factors:

> (1) The type of treatment such juvenile would most likely be amenable to; (2) whether there is evidence that the alleged offense included violence or was committed in an aggressive and premeditated manner; (3) the motivation for the commission of the offense; (4) the age of the juvenile and the ages and circumstances of any others involved in the offense; (5) the previous history of the juvenile, including whether he or she had been convicted of any previous offenses or adjudicated in juvenile court, and, if so, whether such offenses were crimes against the person or relating to property, and other previous history of antisocial behavior, if any, including any patterns of physical violence; (6) the sophistication and maturity of the juvenile as determined by consideration of his or her home, school activities, emotional attitude and desire to be treated as an adult, pattern of living, and whether he or she has had previous contact with law enforcement agencies and courts and the nature thereof; (7) whether there are facilities particularly available to the juvenile court for treatment and rehabilitation of the juvenile; (8) whether the best interests of the juvenile and the security of the public may require that the juvenile continue in custody or under supervision for a period extending beyond his or her minority and, if so, the available alternatives best suited to this purpose; (9) whether the victim agrees to participate in mediation; and (10) such other matters as the county attorney deems relevant to his or her decision.

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[7] See *State v. Doyle*, 237 Neb. 944, 468 N.W.2d 594 (1991).

[8] See *State v. McCracken, supra* note 2.

This section has been revised several times since 1998; the above language was in effect at the time of the district court hearing and decision in this case.

In denying Jones' motion, the district court reasoned that while Jones was not as culpable as his accomplices, he was involved in the planning and commission of the crime charged, and that there was no indication he was coerced or forced into participating. The district court noted Jones' age at the time of the commission of the crime and highlighted the fact that Jones would be subject to juvenile court jurisdiction for approximately 18 months, despite the fact that he stood accused of first degree murder. The court also noted that the victim in this case died after being stabbed 69 times and that it was questionable, given the severity of the crime, whether there were appropriate juvenile services available to Jones. It is clear from the district court's order that all of the factors set forth in § 43-276 were considered by the court.

On appeal, Jones first contends that the district court failed to "adequately consider [his] lack of . . . participation in the planning of the death of the victim."[9] Contrary to this assertion, however, the district court made several references to Jones' involvement in the planning of the crime. For example, the district court noted that "[a]lthough the defendant's part in the homicide may be less culpable than others, reports received into evidence indicate participation in both the planning and carrying out of the offenses charged." The court further noted that "there is no evidence that shows any force or undue influence on the defendant by other participants such that the defendant's actions might be characterized as involuntary. In fact, as previously mentioned, the defendant actually took part in the planning of the offense." Finally, the court found that "[a]lthough other participants had a more active role in the offenses than did the defendant, nevertheless, the defendant took part in both the planning and premeditation as well as the actual commission of the offenses." These various references indicate that the district court considered but rejected Jones' assertion that his

[9] Brief for appellant at 10.

more limited involvement in planning the victim's attack supported a transfer to juvenile court.

Jones also argues that his lack of sophistication and maturity, as well as the fact that he read at just a fourth grade level, suggests that transfer to juvenile court was appropriate. But, as with Jones' planning of the crime, it is clear from a review of the district court's order that these points were considered and rejected by the district court. Moreover, Jones fails to address how his lack of maturity and sophistication would outweigh the other findings of the district court which seem to clearly support the denial of the motion to transfer.

Section 43-276 requires the district court to balance its various findings in determining whether transfer to juvenile court is appropriate. Jones was charged with first degree murder for a crime in which the victim was stabbed 69 times. Jones was 17 years of age at the time of sentencing; the juvenile court would have jurisdiction over him until he was 19 years of age, or for approximately 2 years. At that point, the juvenile court would cease to have jurisdiction and Jones would be released. And while Jones may have been less involved with the planning of this crime in comparison to the other perpetrators, the record indicates that he had at least some involvement in planning the crime. Moreover, evidence was presented at the hearing on Jones' motion suggesting that the juvenile system was not equipped to provide services to juveniles accused of first degree murder.

Given a balancing of these factors, we cannot conclude that the district court abused its discretion when it denied Jones' motion to transfer the case to juvenile court. Jones' second assignment of error is without merit.

CONCLUSION

The record presented to this court is insufficient to allow us to address whether Jones' counsel was ineffective by recommending that Jones plead no contest to first degree murder. As such, we do not further address that argument. In addition, we conclude that the district court did not abuse its discretion in denying Jones' motion to transfer his case to juvenile court. The judgment of the district court is affirmed.

AFFIRMED.

CITIZENS OF DECATUR FOR EQUAL EDUCATION ET AL., APPELLANTS, V. LYONS-DECATUR SCHOOL DISTRICT ET AL., APPELLEES.

739 N.W.2d 742

Filed October 5, 2007. No. S-06-159.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Judgments: Statutes: Appeal and Error.** Concerning questions of law and statutory interpretation, an appellate court resolves the issues independently of the lower court's conclusion.
3. **Schools and School Districts: Statutes.** School boards are creatures of statute, and their powers are limited.
4. **Schools and School Districts: Legislature.** Any action taken by a school board must be through either an express or an implied power conferred by legislative grant.
5. ____: ____. School boards can bind a school district only within the limits fixed by the Legislature.
6. ____: ____. A school board's actions exceeding an express or implied legislative grant of power are void.
7. ____: ____. Whether a school board acted within the power conferred upon it by the Legislature presents a question of law.
8. ____: ____. When the Legislature has delegated authority to school boards to exercise their discretion, a school board's promise to do so in a reorganization petition can bind the school district.
9. **Statutes.** Statutes covering substantive matters in effect at the time of a transaction govern.
10. ____. Statutory interpretation presents a question of law.
11. **Statutes: Appeal and Error.** Absent anything to the contrary, an appellate court will give statutory language its plain and ordinary meaning.
12. ____: ____. An appellate court will not read a meaning into a statute that the language does not warrant; neither will it read anything plain, direct, or unambiguous out of a statute.
13. ____: ____. When confronted with a statutory interpretation issue, an appellate court resolves the issue independently and irrespective of the trial court's conclusion.
14. ____: ____. An appellate court's role, to the extent possible, is to give effect to the statute's entire language, and to reconcile different provisions of the statute so they are consistent, harmonious, and sensible.
15. ____: ____. When possible, an appellate court will try to avoid a statutory construction that would lead to an absurd result.
16. **Constitutional Law: Statutes.** Under strict scrutiny review, the law must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest.

17. **Constitutional Law: Due Process.** Besides guaranteeing fair process, the Nebraska due process clause provides heightened protection against government interference with certain fundamental rights and liberty interests.
18. ____: ____. The Due Process Clauses of both the federal and the state Constitutions forbid the government from infringing upon a fundamental liberty interest, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.
19. **Equal Protection: Due Process: Statutes.** In both equal protection and due process challenges—when a fundamental right or suspect classification is not involved—a government act is a valid exercise of police power if it is rationally related to a legitimate governmental purpose.
20. **Constitutional Law: Schools and School Districts.** The federal Constitution does not provide a fundamental right to education.
21. ____: ____. Under the free instruction clause of the Nebraska Constitution, education in public schools must be free and available to all children.
22. **Constitutional Law: Words and Phrases.** Fundamental rights are those that are implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed.
23. **Constitutional Law: Claims.** There is a significant difference between a claim that government action has infringed upon the exercise of a personal right or liberty and a claim that authorized government action fails to go far enough.
24. **Constitutional Law: Legislature.** A state constitutional provision is not elevated to a fundamental right solely because it mandates legislative action.
25. **Constitutional Law: Schools and School Districts.** Adequate funding of public schools is not a judicially enforceable right under the free instruction clause of the Nebraska Constitution.
26. ____: ____. The free instruction clause of the Nebraska Constitution does not confer a fundamental right to equal and adequate funding of schools.
27. **Schools and School Districts: Legislature: Administrative Law.** The Legislature has statutorily delegated to school boards the duty to determine which schools to operate and, with the consent and advice of the State Department of Education, which grades to offer at schools.
28. **Constitutional Law: Schools and School Districts.** In constitutional challenges to school funding decisions, the appropriate level of scrutiny is whether the challenged school funding decisions are rationally related to a legitimate government purpose.
29. **Constitutional Law: Equal Protection.** The Nebraska Constitution and the U.S. Constitution have identical requirements for equal protection challenges.
30. **Schools and School Districts: Equal Protection.** The action of a school board may implicate the Equal Protection Clause.
31. **Equal Protection.** The Equal Protection Clause requires the government to treat similarly situated people alike.
32. ____. The Equal Protection Clause does not forbid classifications; it simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike.

33. **Constitutional Law: Statutes.** If a legislative classification involves either a suspect class or a fundamental right, courts will analyze the classification with strict scrutiny.
34. **Equal Protection: Words and Phrases.** A suspect class is one that has been saddled with such disabilities or subjected to such a history of purposeful unequal treatment as to command extraordinary protection from the majoritarian political process.
35. **Equal Protection: Statutes.** When a classification created by state action does not jeopardize the exercise of a fundamental right or categorize because of an inherently suspect characteristic, the Equal Protection Clause requires only that the classification rationally further a legitimate state interest.
36. **Equal Protection: Proof.** Under the rational basis test, whether an equal protection claim challenges a statute or some other government act or decision, the burden is upon the challenging party to eliminate any reasonably conceivable state of facts that could provide a rational basis for the classification.
37. **Equal Protection.** The Equal Protection Clause does not require absolute equality or precisely equal advantages.
38. **Equal Protection: Legislature: Intent.** Social and economic measures violate the Equal Protection Clause only when the varying treatment of different groups or persons is so unrelated to the achievement of any legitimate purposes that a court can only conclude that the Legislature's actions were irrational.

Appeal from the District Court for Burt County: DARVID D. QUIST, Judge. Affirmed.

David V. Drew and Gregory P. Drew, of Drew Law Firm, for appellants.

Karen A. Haase and John Selzer, of Harding, Shultz & Downs, for appellees.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

CONNOLLY, J.

In 1984, the former Decatur and Lyons, Nebraska, school boards petitioned to dissolve the Decatur School District and add its territory to the Lyons School District.[1] In 2005, the appellants, a coalition of parents and taxpayers in Decatur (Coalition), sued the reorganized Lyons-Decatur School District and the school board members (collectively the school district).

[1] See Neb. Rev. Stat. § 79-402.03 (Reissue 1981). See, also, *Nicholson v. Red Willow Cty. Sch. Dist. No. 0170*, 270 Neb. 140, 699 N.W.2d 25 (2005) (explaining petition procedures by voters and school boards).

The Coalition sought to enjoin the school district from moving grades four through six from Decatur to Lyons. The Coalition alleged that the reduction in classes at the Decatur school breached the previously adopted merger petition because the school district failed to follow the required voting protocol set out in the merger petition. It also alleged that the school district violated the Coalition members' substantive due process and equal protection rights because the school district was operating the Decatur school without equal grades, teachers, facilities, and educational opportunities. The district court granted the school district's summary judgment motion on all the Coalition's claims and dismissed the Coalition's complaint with prejudice.

We will set out our reasoning with specificity in the following pages, but, briefly stated, we hold that (1) the voting requirements in the merger petition that the Coalition relies on are unenforceable and (2) the free instruction clause of the Nebraska Constitution does not confer a fundamental right to equal and adequate funding of schools. Applying the rational basis analysis, we conclude the school district's action advanced a legitimate educational goal. Accordingly, we affirm.

I. BACKGROUND

1. Reorganization Petition

In 1984, the school boards of the Lyons School District, a Class III district, and the Decatur School District, a Class II district,[2] filed a reorganization petition.[3] The petition sought to enlarge the boundaries of the Lyons School District to include the territory of the Decatur School District. Paragraph IV(A) of the reorganization petition provided:

> An attendance center for elementary students (kindergarten through sixth grade) shall be maintained in the existing Decatur School District facility until such time as the legal voters and electors of the former Decatur School District . . . and the Board of education vote by majority vote to discontinue the attendance center or until such time as all of the members of the board of education of the enlarged

[2] See Neb. Rev. Stat. § 79-102 (Reissue 1981).

[3] See Neb. Rev. Stat. § 79-402 (Reissue 1981).

Lyons School District vote unanimously to discontinue the attendance center.

2. School Board Moves Grades Four Through Six to Lyons, and Coalition Responds

In April 2004, the school district's superintendent, F.J. Forsberg, mailed an informational letter to patrons explaining the district's financial problems. Forsberg stated that the school district had lost significant state aid over the previous 4 years. He projected more losses for the upcoming school year because of changes in the school aid formula, declining enrollment, and an economic downturn. He further projected that the school district would continue to lose state aid through 2007 because of declining enrollment. He explained that the district had attempted to meet the deficits by several cost-saving measures: (1) reducing building maintenance, (2) not hiring for certain teaching positions, (3) combining grades at the Decatur school where student enrollment had dropped, (4) cutting building and instructional supplies, and (5) reducing the budget reserve. The district proposed similar cuts for the 2004-05 school year. He included a list of cost-saving measures the school board was considering, including moving part, or all, of the Decatur school to Lyons.

In January 2005, the school board rejected a motion to close the Decatur school. It voted 6 to 3, however, to operate it only for kindergarten through grade three and to move grades four through six to Lyons. In April, the Coalition filed this action.

The Coalition sought a temporary and permanent injunction to stop the school district from moving grades four through six to Lyons without obtaining the required votes. It also sought a declaration that the school district's action (1) was void because it violated the merger petition, (2) denied its members procedural due process, and (3) violated its members' substantive due process and equal protection rights by operating the Decatur school without "individual teachers for each grade, equal facilities, and equal educational opportunities."

3. Temporary Injunction Hearing

At the temporary injunction hearing, Forsberg testified that the school district had lost about $580,000 in state aid since

1999. He also stated that the Decatur school had experienced a larger drop in enrollment than the Lyons school. He stated that 3 or 4 years before, the board began eliminating some positions and hours at Lyons. It also began combining some grades at Decatur. Having few cost-saving options left, the board decided to move Decatur's grades four through six to Lyons. He stated that the Coalition's members were present at school board meetings when the board discussed cutting costs and that the Coalition's attorney addressed the board on these topics.

At the hearing, Forsberg presented a summary from school census reports which showed the Decatur school had considerably fewer students than Lyons. In Decatur, 36 students were then enrolled in grades kindergarten through six, and he projected Decatur would have 17 students in grades kindergarten through three the next year. In contrast, Lyons had 111 students enrolled in grades kindergarten through six, and he projected Lyons would have 52 students in grades kindergarten through three the next year. Forsberg testified that moving grades four through six from Decatur to Lyons would save the school district more than $200,000.

Forsberg stated that beginning with the 2004-05 school year, the school district bussed all students under grade seven in special education from Decatur to Lyons. Lyons and Decatur are 15 miles apart, and the commute time for students by bus is 25 to 30 minutes. After the hearing, the district court determined that the Coalition had failed to establish a clear right to relief and denied its request for a temporary injunction.

4. Summary Judgment Hearing on Coalition's Violation of Merger Petition and Procedural Due Process Claims

The Coalition moved for summary judgment on its first and second causes of action: breach of the merger petition and violation of its members' procedural due process rights. In July 2005, the court heard the summary judgment motion. The school district argued that the merger petition conflicted with what is now Neb. Rev. Stat. § 79-419(2) (Reissue 2003 & Cum. Supp. 2006). It argued that paragraph IV(A) exceeded the former Lyons and Decatur school boards' authority in two ways.

First, the school district argued that the merger statute allowed the merging school boards to require a vote by electors in the reorganized district who are served by a school. But it did not authorize a vote by electors in a former school district, as required by paragraph IV(A). Second, it argued that the merger statute allowed the former school boards to require a majority vote by electors before closing a school, but it did not authorize a majority vote before discontinuing any grades at a school.

The school district also argued it had provided due process. It argued that due process required only notice and an opportunity to be heard at the meeting when the school district discussed cost-saving measures.

The court denied the Coalition's partial summary judgment motion regarding its first and second causes of action. In addition, relying on *In re Freeholders Petition*,[4] the court granted summary judgment to the school district on those causes of action. The Coalition appealed, but the Nebraska Court of Appeals dismissed the appeal for lack of jurisdiction.[5]

5. Summary Judgment Hearing on Coalition's Equal Protection and Substantive Due Process Claims

On remand, the Coalition moved for a final judgment order under Neb. Rev. Stat. § 25-1315(1) (Cum. Supp. 2006), and the school district moved for summary judgment on the Coalition's third and fourth causes of action: violation of its members' equal protection and substantive due process rights. At the hearing, the Coalition submitted affidavits stating that (1) the school district had made financial cuts to the Decatur school, while providing improvements and benefits for the Lyons school, and (2) this funding deprivation had caused a decline in enrollment at Decatur as the facilities became inferior to those in Lyons. A former teacher stated in an affidavit that parents of children in the Decatur school had been opting to send their children to Lyons. She stated that the parents did not believe the children were receiving an equal education.

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[4] *In re Freeholders Petition*, 210 Neb. 583, 316 N.W.2d 294 (1982).

[5] *Citizens of Decatur v. Lyons-Decatur Sch. Dist.*, 14 Neb. App. xlv (No. A-05-1127, Oct. 13, 2005).

The Coalition argued that the school district's unequal funding of the Lyons and Decatur schools violated its members' equal protection and substantive due process rights. To support those constitutional claims, the Coalition argued that Nebraska's free instruction clause[6] provided a fundamental right to an education equally or proportionally funded compared with other schools in the same district. It further argued that the school district's underfunding of the Decatur school had deprived those students of their substantive due process rights.

The school district countered that the free instruction clause did not provide a fundamental right to have schools in the same district equally or proportionately funded. It further argued the Coalition did not have a fundamental right to identical facilities or offerings as other schools or to choose where a child attends school. Finally, it pointed out that the Coalition did not allege the school district had failed to educate Decatur children or that it had charged them tuition. Absent a fundamental right, the school district argued that the school district had offered a rational basis for moving the grades to Lyons.

In February 2006, the court granted the school district's motion for summary judgment on the Coalition's equal protection and substantive due process claims. It denied the Coalition's motion for final judgment as moot and dismissed the Coalition's complaint with prejudice.

II. ASSIGNMENTS OF ERROR

The Coalition generally assigns that the district court erred in granting summary judgment for the school district on all four of its causes of action. More specifically, it assigns, restated and renumbered, that the court erred in failing to (1) determine that the merger petition was legally enforceable and required the school board to maintain the Decatur school with grades kindergarten through six unless a majority of the voters in the former Decatur School District or every member of the school board voted for discontinuance of the school; (2) find that the school board breached the merger petition and that the Coalition's members would suffer irreparable harm if the school district

[6] Neb. Const. art. VII, § 1.

were not enjoined from moving Decatur's grades four through six to Lyons; (3) determine that under the merger petition, the Coalition members had a property and liberty interest in maintaining grades kindergarten through six at Decatur; (4) determine that due process required a vote in accordance with the merger petition before Decatur's grades four through six could be moved to Lyons; (5) determine that Decatur students have an equal protection right to obtain the free instruction "guaranteed by the Nebraska Constitution, statutes and regulations"; (6) find genuine issues of material fact whether the school district had underfunded the Decatur school to its detriment and in comparison to other schools in the district, and whether this underfunding had resulted in "inadequate quality of education" for Decatur students; and (7) find genuine issues of material fact whether the school district had violated the Decatur students' substantive due process rights by interfering with their right to obtain free instruction.

III. STANDARD OF REVIEW

[1,2] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[7] Concerning questions of law and statutory interpretation, we resolve the issues independently of the lower court's conclusion.[8]

IV. ANALYSIS

1. Enforceability of Merger Agreement

The parties do not dispute the terms of the merger agreement. They agree paragraph IV(A) provides that the school district maintain a school in Decatur for grades kindergarten through six unless one of two voting requirements were satisfied. Either the school board could vote unanimously to discontinue the school or a majority of the school board and voters from the

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[7] *Nebraska Coalition for Ed. Equity v. Heineman*, 273 Neb. 531, 731 N.W.2d 164 (2007).

[8] *Japp v. Papio-Missouri River NRD*, 273 Neb. 779, 733 N.W.2d 551 (2007).

former Decatur School District could vote to discontinue it. The parties also do not dispute that the school board's action was taken without obtaining a unanimous vote of the school board or a majority vote of the electors from the former Decatur School District. The Coalition argues that the court incorrectly determined that paragraph IV(A) was unenforceable. It claims merger petitions have the effect of law and school districts are bound by their terms. But the school district argues that the merger petition conflicts with Neb. Rev. Stat. § 79-402.07 (Reissue 1981), which authorized school districts to require only a vote by a majority of *all* legal voters served by a school in the reorganized district and only when a school board seeks to discontinue a school.

The court did not state its reasons for granting summary judgment to the school district on the Coalition's claim that the school district had breached the merger petition. We conclude, however, that the court could have properly granted summary judgment for the school district only if paragraph IV(A) is unenforceable.

[3-7] "We have long acknowledged that school boards are creatures of statute, and their powers are limited."[9] Any action taken by a school board must be through either an express or an implied power conferred by legislative grant.[10] School boards can bind a school district only within the limits fixed by the Legislature.[11] A school board's actions exceeding an express or implied legislative grant of power are void.[12] And whether a school board acted within the power conferred upon it by the Legislature presents a question of law.[13]

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[9] *Busch v. Omaha Pub. Sch. Dist.*, 261 Neb. 484, 488, 623 N.W.2d 672, 676 (2001).

[10] *Id.*

[11] *Spencer v. Omaha Pub. Sch. Dist.*, 252 Neb. 750, 566 N.W.2d 757 (1997).

[12] See, *State ex rel. Fick v. Miller*, 255 Neb. 387, 584 N.W.2d 809 (1998), citing *Spencer v. Omaha Pub. Sch. Dist., supra* note 11; *School Dist. of Waterloo v. Hutchinson*, 244 Neb. 665, 508 N.W.2d 832 (1993).

[13] See *Spencer v. Omaha Pub. Sch. Dist., supra* note 11.

[8] The Coalition argues that *State ex rel. Fick v. Miller*,[14] supports its claim that paragraph IV(A) was enforceable. In *State ex rel. Fick*, we held that reorganization petitions have the effect of law and create duties owed to the public. We compared the petition to statutes, city charters, city ordinances, regulations, code of ethics rules, and public franchise contracts.[15] Because they have the force of law, ministerial acts required under the petition can be enforced through a writ of mandamus if the provision is valid. Specifically, we held that an affiliated high school had an enforceable ministerial duty to provide transportation to rural students because two conditions were satisfied. This provision was included in the affiliation petition, and the school board was statutorily authorized to bind the district to such terms. In *State ex rel. Fick*, we explicitly stated:

> Section 79-611(4) grants affiliated school districts the authority to provide free transportation [to students residing in an affiliated Class I district], but neither creates any ministerial legal duty nor provides for the enforcement of any duty. This provision is necessary to provide school boards with the authority to bind their districts to terms like the . . . affiliation petition's [transportation provision].[16]

So when the Legislature has delegated authority to school boards to exercise their discretion, a school board's promise to do so in a reorganization petition can bind the school district. Thus, we look to whether the school board had statutory authority to impose the voting restriction in paragraph IV(A).

We first note that school boards are under no statutory duty to maintain a school in their district.

> The school board of any district maintaining more than one school may close any school or schools within such district and may make provision for the education of children either in another school of the district, in the school of any other district, or by correspondence instruction for such children as may be physically incapacitated for

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[14] *State ex rel. Fick v. Miller, supra* note 12.

[15] *Id.*

[16] *Id.* at 397, 584 N.W.2d at 817.

> traveling to or attending other schools, with the permission of the parent.[17]

Further, the Legislature has given school boards the discretion to establish and classify grades, with the consent and advice of the State Department of Education.[18]

[9] When the school boards petitioned for reorganization in 1984, § 79-402.07, in relevant part, provided:

> The [reorganization] petition may contain provisions for the holding of school within existing buildings in the newly reorganized district and that a school constituted under the provisions of this section shall be maintained from the date of reorganization unless the legal voters *served by the school* vote by a majority vote for discontinuance of the school.[19]

(Emphasis supplied.) Statutes covering substantive matters in effect at the time of a transaction govern.[20] This language, however, is nearly identical to that used in the current codification at § 79-419(2).

[10-12] In interpreting § 79-402.07, we are guided by familiar canons of statutory construction. Statutory interpretation presents a question of law.[21] Absent anything to the contrary, we will give statutory language its plain and ordinary meaning.[22] We will not read a meaning into a statute that the language does not warrant; neither will we read anything plain, direct, or unambiguous out of a statute.[23]

Section 79-402.07 unambiguously allowed school districts to require a majority vote by all the legal voters *served by a*

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[17] Neb. Rev. Stat. § 79-1094 (Reissue 2003).

[18] Neb. Rev. Stat. § 79-526 (Reissue 2003). Compare *State ex rel. Shineman v. Board of Education*, 152 Neb. 644, 42 N.W.2d 168 (1950).

[19] See, also, Neb. Rev. Stat. § 79-402.06 (Reissue 1981) (providing that petitions by voters and school boards are subject to same requirements for contents).

[20] See *Bowers v. Dougherty*, 260 Neb. 74, 615 N.W.2d 449 (2000).

[21] *Rohde v. City of Ogallala*, 273 Neb. 689, 731 N.W.2d 898 (2007).

[22] See *City of Elkhorn v. City of Omaha*, 272 Neb. 867, 725 N.W.2d 792 (2007).

[23] See *McCray v. Nebraska State Patrol*, 271 Neb. 1, 710 N.W.2d 300 (2006).

school because that is the only restriction on "legal voters." It did not, however, explicitly state whether the "legal voters" must be part of the reorganized district or could be part of the former district.

[13-15] When confronted with a statutory interpretation issue, we resolve the issue independently and irrespective of the trial court's conclusion.[24] Our role, to the extent possible, is to give effect to the statute's entire language, and to reconcile different provisions of the statute so they are consistent, harmonious, and sensible.[25] When possible, we will try to avoid a statutory construction that would lead to an absurd result.[26] Here, several factors weigh against interpreting § 79-402.07 to support the voting restrictions placed in the reorganization petition.

First, interpreting § 79-402.07 as allowing merging school boards to require a majority vote in a former school district would lead to an absurd result. We would have to conclude that the Legislature intended the surviving school board's decision to discontinue a school to be conditioned upon approval from a school district that has ceased to exist.[27]

Second, the statutory provision at issue consists of a single sentence. The Legislature unambiguously referred to "the holding of school within existing buildings in the *newly reorganized district*."[28] It would be inconsistent to interpret a reference to "legal voters served by the school" in the same sentence to mean voters from the former school district.

Third, we do not read § 79-402.07 as authorizing merging school boards to impose *any* voting restrictions on the surviving school district's discretion. We acknowledge that the disputed sentence provides that "[t]he petition may contain provisions for the holding of school within existing buildings in the newly

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[24] See *Sjuts v. Granville Cemetery Assn.*, 272 Neb. 103, 719 N.W.2d 236 (2006).

[25] *In re Interest of Tamantha S.*, 267 Neb. 78, 672 N.W.2d 24 (2003).

[26] See, *Livengood v. Nebraska State Patrol Ret. Sys.*, 273 Neb. 247, 729 N.W.2d 55 (2007); *City of Elkhorn v. City of Omaha, supra* note 22.

[27] See *School Dist. of Bellevue v. Strawn*, 185 Neb. 392, 176 N.W.2d 42 (1970).

[28] § 79-402.07 (emphasis supplied).

reorganized district . . . .” But if the Legislature had intended to permit merging school boards to impose any voting restrictions on the surviving school board’s discretion, it would not have specified the type of voting restriction that could be imposed. That is, the disputed sentence specifically authorizes a majority vote by the legal voters served by a school for the discontinuance of the school. Reading § 79-402.07 to authorize *any* voting restrictions renders the Legislature’s stated restriction meaningless.

Unlike the school transportation statute at issue in *State ex rel. Fick*,[29] § 79-402.07 neither expressly nor impliedly authorized the Decatur and Lyons school boards to require a majority vote by legal voters in the former Decatur School District. Nor did it authorize a unanimous vote by the surviving school board as a condition for discontinuing the Decatur school. Further, § 79-402.07 affirmatively described the circumstance in which a school board could exercise its power to require a vote: the “discontinuance of the school.”

The plain and ordinary meaning of “discontinuance” is cessation or closure.[30] As the school district points out, other courts have specifically held that moving particular grades from one school to another is not the discontinuance or closing of a school.[31]

In sum, § 79-402.07 authorized the former school boards to require a vote only if the surviving school board for the reorganized district intended to close a school. It did not authorize the voting restrictions placed in paragraph IV(A). Because the school boards did not have authority to impose the voting requirements in paragraph IV(A), they were void and unenforceable. The Coalition does not allege, nor does the record reflect, that the school board acted in bad faith to circumvent the voting requirement. Instead, it reflects that the school board, faced

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[29] *State ex rel. Fick v. Miller, supra* note 12.

[30] See Webster’s Third New International Dictionary Unabridged 646 (1993).

[31] See, *Lang v. Board of Trustees of Joint School Dist. No. 251*, 93 Idaho 79, 455 P.2d 856 (1969); *Western Area Business, etc. v. Duluth, etc.*, 324 N.W.2d 361 (Minn. 1982); *Choal, et al. v. Lyman Sch. Dist. Bd. of Ed.*, 87 S.D. 682, 214 N.W.2d 3 (1974).

with budget deficits, acted to maintain the Decatur school to the extent the district had resources to do so. The district court did not err in determining that paragraph IV(A) of the reorganization petition was unenforceable.

2. Procedural Due Process

The Coalition argues the school district denied it due process. It claims that due process required the school board to comply with paragraph IV(A) of the merger petition before moving grades four through six from Decatur to Lyons. Having concluded that those voting restrictions were void, we need not address this argument.

3. Substantive Due Process

The Coalition argues that the district court erred in finding that its members did not have a substantive due process right to obtain the free instruction guaranteed by Nebraska's Constitution, statutes, and regulations. The Coalition's substantive due process argument hinges on Nebraska's free instruction clause. The free instruction clause, in relevant part, provides: "The Legislature shall provide for the free instruction in the common schools of the state of all persons between the ages of five and twenty-one years."[32]

The Coalition does not claim that the school district denied students an education or charged tuition. Instead, it argues—for both its substantive due process and equal protection claims—that the school district has not provided equal facilities or funding to both schools. Thus, consistent with its complaint and arguments to the trial court, we construe the Coalition's argument to be that the free instruction clause guarantees a fundamental right to equal and adequate funding of schools within the same school district.

[16] The Coalition contends that the free instruction clause provides a fundamental right to an equal opportunity to obtain a free education "in the context of school funding."[33] Thus, it argues any government action affecting free instruction is subject

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[32] Neb. Const. art. VII, § 1.

[33] Brief for appellants at 39.

to strict scrutiny. Under strict scrutiny review, the law must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest.[34] The Coalition claims the school district's actions were not narrowly tailored to meeting budget deficits because it did not take similar cost-saving measures at both schools.

The school district, however, argues that this court has never found free instruction to be a fundamental right under the state Constitution. It argues that applying strict scrutiny to school board decisions is contrary to the broad discretion granted to school boards by both this court and the Legislature. We begin by explaining the limits of substantive due process protections.

[17] The due process clause provides that "[n]o person shall be deprived of life, liberty, or property, without due process of law . . . ."[35] This language is similar to the Due Process Clause of the federal Constitution,[36] which provides both procedural and substantive protections.[37] In privacy and parental right claims, we have recognized that besides guaranteeing fair process, the Nebraska due process clause "'"provides heightened protection against government interference with certain fundamental rights and liberty interests."'"[38]

[18,19] We have recognized that the Due Process Clauses of both the federal and the state Constitutions forbid the government from infringing upon a fundamental liberty interest, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.[39] In both equal protection and due process challenges—when a fundamental

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[34] *Hamit v. Hamit*, 271 Neb. 659, 715 N.W.2d 512 (2006).

[35] Neb. Const. art. I, § 3.

[36] See U.S. Const. amend. XIV, § 1.

[37] See, e.g., *Harrah Independent School Dist. v. Martin*, 440 U.S. 194, 99 S. Ct. 1062, 59 L. Ed. 2d 248 (1979).

[38] *Hamit v. Hamit, supra* note 34, 271 Neb. at 665, 715 N.W.2d at 520, quoting *Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000). Accord *State v. Senters*, 270 Neb. 19, 699 N.W.2d 810 (2005).

[39] See *In re Adoption of Baby Girl H.*, 262 Neb. 775, 635 N.W.2d 256 (2001), citing *Washington v. Glucksberg*, 521 U.S. 702, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997).

right or suspect classification is not involved—a government act is a valid exercise of police power if it is rationally related to a legitimate governmental purpose.[40]

[20] The federal Constitution does not provide a fundamental right to education.[41] Nevertheless, the Coalition argues that the free instruction clause of the Nebraska Constitution provides a fundamental right to equal educational funding. Its argument is twofold. First, it contends that our decision in *Kolesnick v. Omaha Pub. Sch. Dist.*,[42] "stands for the proposition that education is a fundamental right in Nebraska with regard to school financing."[43]

(a) We Did Not Recognize a Fundamental Right to Education Funding in *Kolesnick*

In *Kolesnick*, we held that in student discipline cases, "no fundamental right to education exists in Nebraska," "which would trigger strict scrutiny analysis whenever a student's misconduct results in expulsion for the interest of safety."[44] We concluded that the free instruction clause did not provide such a right and distinguished other cases involving the free instruction clause. But the Coalition plucks the following language from *Kolesnick*[45]:

> We have not construed [the free instruction clause] language in the context of student discipline to mean that a fundamental right to education exists in this state . . . . Rather, we have construed the term "free instruction" in right to education cases as pertinent to the issue of

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[40] See, *Le v. Lautrup*, 271 Neb. 931, 716 N.W.2d 713 (2006); *State v. Champoux*, 252 Neb. 769, 566 N.W.2d 763 (1997). Compare *Washington v. Glucksberg, supra* note 39, with *Vacco v. Quill*, 521 U.S. 793, 117 S. Ct. 2293, 138 L. Ed. 2d 834 (1997).

[41] *San Antonio School District v. Rodriguez*, 411 U.S. 1, 93 S. Ct. 1278, 36 L. Ed. 2d 16 (1973).

[42] *Kolesnick v. Omaha Pub. Sch. Dist.*, 251 Neb. 575, 558 N.W.2d 807 (1997).

[43] Brief for appellants at 38.

[44] *Kolesnick v. Omaha Pub. Sch. Dist., supra* note 42, 251 Neb. at 581-82, 558 N.W.2d at 813.

[45] *Id.* at 581, 558 N.W.2d at 813.

> the constitutionality of school financing, including collection of fees, tuition, and taxes. See, *Banks v. Board of Education of Chase County*[46]; *Tagge v. Gulzow*[47]; *State, ex rel. Baldwin, v. Dorsey*[48]; *Martins v. School District*[49]. See, also, *Doe v. Superintendent of Sch*[*ools*] *of Worcester*[50].

The Coalition's reliance on our statement that the free instruction clause is "pertinent to the issue of the constitutionality of school financing" is misplaced. We clearly did not state that students have a fundamental right to equal educational funding in *Kolesnick*, and none of the cases cited in *Kolesnick* support that position.

[21] Recently, we cited three of the cases relied on in *Kolesnick*: *Tagge v. Gulzow*,[51] *State, ex rel. Baldwin, v. Dorsey*,[52] and *Martins v. School District*.[53] Those cases illustrate that the only qualitative, constitutional standards for public schools we could enforce under the free instruction clause are that "education in public schools must be free and available to all children."[54] In *Banks v. Board of Education of Chase County*,[55] we held that a school district's statutory power to levy taxes was not an unlawful delegation of legislative authority. We reasoned that the purpose of school districts is "'to fulfill the Legislature's duty "to encourage schools and the means of

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[46] *Banks v. Board of Education of Chase County*, 202 Neb. 717, 277 N.W.2d 76 (1979).

[47] *Tagge v. Gulzow*, 132 Neb. 276, 271 N.W. 803 (1937).

[48] *State, ex rel. Baldwin, v. Dorsey*, 108 Neb. 134, 187 N.W. 879 (1922).

[49] *Martins v. School District*, 101 Neb. 258, 162 N.W. 631 (1917).

[50] *Doe v. Superintendent of Schools of Worcester*, 421 Mass. 117, 653 N.E.2d 1088 (1995).

[51] *Tagge v. Gulzow, supra* note 47.

[52] *State, ex rel. Baldwin, v. Dorsey, supra* note 48.

[53] *Martins v. School District, supra* note 49.

[54] *Nebraska Coalition for Ed. Equity v. Heineman, supra* note 7, 273 Neb. at 550, 731 N.W.2d at 179.

[55] *Banks v. Board of Education of Chase County, supra* note 46.

instruction" . . . .'"[56] Like this court in *Kolesnick*, in *Doe v. Superintendent of Schools of Worcester*,[57] the Massachusetts Supreme Court was dealing with a student disciplinary case. There, the court explicitly stated that it had never held students have a fundamental right to education. We conclude that *Kolesnick* is not controlling.

(b) *Rodriguez* Test Is Inapplicable to Nebraska's Constitution

The crux of the Coalition's alternative argument is that the free instruction clause explicitly states the Legislature shall provide a free public education to persons between the ages of 5 and 21. Thus, it argues the Nebraska Constitution provides a fundamental right to educational funding.

[22] Fundamental rights have been defined as those that are "'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'"[58] The U.S. Supreme Court has stated that

> in addition to the specific freedoms protected by the Bill of Rights, the "liberty" specially protected by the Due Process Clause includes the rights to marry, . . . to have children, . . . to direct the education and upbringing of one's children, . . . to marital privacy, . . . to use contraception, . . . to bodily integrity, . . . and to abortion . . . .[59]

The Coalition relies on the U.S. Supreme Court's statement in *San Antonio School District v. Rodriguez*.[60] There, the Court stated that the key to discovering whether education is fundamental "lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution."[61] Yet many state courts have rejected the *Rodriguez* test for

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[56] *Id.* at 721, 277 N.W.2d at 79, quoting *Campbell v. Area Vocational Technical School No. 2*, 183 Neb. 318, 159 N.W.2d 817 (1968).

[57] See *Doe v. Superintendent of Schools of Worcester, supra* note 50.

[58] *Washington v. Glucksberg, supra* note 39, 521 U.S. at 721, quoting *Palko v. Connecticut*, 302 U.S. 319, 58 S. Ct. 149, 82 L. Ed. 288 (1937).

[59] *Id.*, 521 U.S. at 720 (citations omitted).

[60] See *San Antonio School District v. Rodriguez, supra* note 41.

[61] *Id.*, 411 U.S. at 33.

determining whether education is a fundamental right under their state constitution.[62] These courts have reasoned that "state constitutions, unlike the federal constitution, are not of limited or delegated powers and are not restricted to provisions of fundamental import; consequently, whether a right is fundamental should not be predicated on its explicit or implicit inclusion in a state constitution."[63]

Unlike the federal Constitution, state constitutions are not an enumerated list of the government's limited powers. States have all powers not delegated to the federal government nor prohibited to them by the U.S. Constitution.[64] State constitutions include provisions related to providing government services at the local level. Many state provisions for government services "could as well have been left to statutory articulation" under the Legislature's plenary power and are not considered implicit to our concept of ordered liberty.[65]

[23] Accordingly, an express legislative power or duty to provide services in a state constitution pales in comparison to constitutional provisions prohibiting the government's interference with personal rights. As the *Rodriguez* Court recognized, there is a significant difference between a claim that government action has infringed upon the exercise of a personal right or liberty and a claim that authorized government action fails to go far enough. In the latter case, there would be no logical limitation on the

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[62] See, e.g., *Hornbeck v. Somerset Co. Bd. of Educ.*, 295 Md. 597, 458 A.2d 758 (1983) (citing cases).

[63] *Id.* at 647, 458 A.2d at 785. Accord, *Lujan v. Colorado State Bd. of Educ.*, 649 P.2d 1005 (Colo. 1982); *McDaniel v. Thomas*, 248 Ga. 632, 285 S.E.2d 156 (1981); *Idaho Schools for Equal Educ. v. Evans*, 123 Idaho 573, 850 P.2d 724 (1993); *Levittown USFD v Nyquist*, 57 N.Y.2d 27, 439 N.E.2d 359, 453 N.Y.S.2d 643 (1982); *Bd. of Edn. v. Walter*, 58 Ohio St. 2d 368, 390 N.E.2d 813 (1979); *Olsen v. State ex rel Johnson*, 276 Or. 9, 554 P.2d 139 (1976). See, also, *Lewis E. v. Spagnolo*, 186 Ill. 2d 198, 710 N.E.2d 798, 238 Ill. Dec. 1 (1999); *City of Pawtucket v. Sundlun*, 662 A.2d 40 (R.I. 1995).

[64] See U.S. Const. amend. X.

[65] See *Levittown USFD v Nyquist, supra* note 63, 57 N.Y.2d at 44 n.5, 439 N.E.2d at 366 n.5, 453 N.Y.S.2d at 650 n.5. See, also, *Bd. of Edn. v. Walter, supra* note 63.

State's duties to provide services if a court were to conclude that such duties conferred personal liberty interests and apply strict scrutiny analysis.[66]

[24] Moreover, a state constitutional provision is not elevated to a fundamental right solely because it mandates legislative action.[67] For example, the Nebraska Constitution also requires the Legislature to provide for the organization of townships[68] and corporations.[69] Yet these provisions do not create fundamental rights.[70]

Other courts have pointed out the vulnerability of the *Rodriguez* test in considering property rights.[71] Although the right to acquire and hold property is an interest protected by the federal and state Constitutions, "'"that right is not a likely candidate for such preferred treatment."'"[72]

We also agree that no distinction exists upon which to elevate the funding of education to a fundamental interest over the funding of other vital state services: services that are also provided through the state's political subdivisions created under constitutional provisions. Considering the potential reach of *Rodriguez*, courts have concluded that other state services "could, within the *Rodriguez* formulation of fundamental rights, be deemed implicitly guaranteed in most state constitutions."[73] Even more illuminating, the *Rodriguez* court recognized the potential fallout of applying strict scrutiny to school funding decisions. "In such a complex arena in which no perfect alternatives exist, the Court does well not to impose too rigorous a standard of scrutiny lest all local fiscal schemes become subjects of criticism under the

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[66] Compare *San Antonio School District v. Rodriguez,* supra note 41.

[67] See *Lujan v. Colorado State Bd. of Educ., supra* note 63.

[68] See Neb. Const. art. IX, § 5.

[69] See Neb. Const. art. XII, § 1.

[70] See *Dwyer v. Omaha-Douglas Public Building Commission*, 188 Neb. 30, 195 N.W.2d 236 (1972).

[71] See, e.g., *Lujan v. Colorado State Bd. of Educ., supra* note 63.

[72] *Id.* at 1017 n.12. See, also, *Nelsen v. Tilley*, 137 Neb. 327, 289 N.W. 388 (1939).

[73] See, e.g., *Hornbeck v. Somerset Co. Bd. of Educ., supra* note 62, 295 Md. at 649, 458 A.2d at 785.

Equal Protection Clause."[74] Because the Nebraska Constitution is not an enumeration of limited powers,[75] we conclude that it would be inappropriate to apply the U.S. Supreme Court's test in *Rodriguez* to our constitution.

(c) Nebraska's Constitution Does Not Confer a Fundamental Right to Equal and Adequate Funding of Schools

[25] No court questions the vital importance of public education in a democratic society. But "[a] heartfelt recognition and endorsement of the importance of an education does not elevate a public education to a fundamental interest warranting strict scrutiny."[76] No doubt Nebraska's children are entitled to a free education. Nevertheless, we recently concluded that prudential and practical considerations require that we not intervene in fiscal policy decisions regarding education.[77] In *Nebraska Coalition for Ed. Equity v. Heineman* (*Nebraska Coalition*),[78] we specifically stated that the framers of the Nebraska Constitution rejected language that required uniformity between schools. We concluded that the Nebraska Constitution committed the determination of adequate school funding solely to the Legislature. We further reasoned that the relationship between school funding and educational quality involved policy determinations that were inappropriate for judicial resolution.[79] We therefore held in *Nebraska Coalition* that adequate funding of public schools is not a judicially enforceable right under the free instruction clause.

The Coalition cites decisions in which state courts have held their state constitutions provide a fundamental right to equal educational funding. We conclude, however, that these decisions are unpersuasive. Two of these states have education

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[74] *San Antonio School District v. Rodriguez, supra* note 41, 411 U.S. at 41.

[75] See, e.g., *Pony Lake Sch. Dist. v. State Committee for Reorg.*, 271 Neb. 173, 710 N.W.2d 609 (2006).

[76] *Lujan v. Colorado State Bd. of Educ., supra* note 63, 649 P.2d at 1018.

[77] *Nebraska Coalition for Ed. Equity v. Heineman, supra* note 7.

[78] *Id.*

[79] Accord *San Antonio School District v. Rodriguez, supra* note 41.

articles that are more comprehensive[80] than the "paucity of standards" contained in Nebraska's free instruction clause.[81] Another state constitution contained provisions that the court construed to require equal distribution of school funds,[82] which are similar to provisions the people of Nebraska omitted or deleted from our constitution.[83] The Coalition also cites a decision by the Alabama Supreme Court.[84] But we have noted that the Alabama Supreme Court changed course in 2002, holding that a constitutional challenge to school funding presented a nonjusticiable issue and dismissing the action.[85]

It is true that the California and North Dakota Supreme Courts have determined their state constitutions provide a fundamental right to equal educational funding despite education articles that required only a free public school system.[86] These decisions, however, are contrary to the greater weight of authority[87] and, more important, they are contrary to our decision in *Nebraska Coalition*.

[26] In *Nebraska Coalition*, we implicitly concluded that the free instruction clause does not confer a fundamental right to adequate funding of schools, or we would have decided the

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[80] See, *Pauley v. Kelly*, 162 W. Va. 672, 255 S.E.2d 859 (1979); *Washakie Co. Sch. Dist. No. One v. Herschler*, 606 P.2d 310 (Wyo. 1980).

[81] See *Nebraska Coalition for Ed. Equity v. Heineman, supra* note 7, 273 Neb. at 552, 731 N.W.2d at 180.

[82] *Horton v. Meskill*, 172 Conn. 615, 376 A.2d 359 (1977).

[83] See *Nebraska Coalition for Ed. Equity v. Heineman, supra* note 7.

[84] *Opinion of the Justices*, 624 So. 2d 107 (Ala. 1993).

[85] *Nebraska Coalition for Ed. Equity v. Heineman, supra* note 7, citing *Ex Parte James*, 836 So. 2d 813 (Ala. 2002).

[86] *Serrano v. Priest*, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971). See, also, *Serrano v. Priest*, 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1976); *Bismarck Public School Dist. 1 v. State*, 511 N.W.2d 247 (N.D. 1994).

[87] See, *Lujan v. Colorado State Bd. of Educ., supra* note 63; *McDaniel v. Thomas, supra* note 63; *Idaho Schools for Equal Educ. v. Evans, supra* note 63; *Lewis E. v. Spagnolo, supra* note 63; *Hornbeck v. Somerset Co. Bd. of Educ., supra* note 62; *Levittown USFD v Nyquist, supra* note 63; *Bd. of Edn. v. Walter, supra* note 63; *Olsen v. State ex rel Johnson, supra* note 63; *City of Pawtucket v. Sundlun, supra* note 63.

issue. We also noted that the U.S. Supreme Court had held open the possibility that some 14th Amendment claims would be nonjusticiable because they are too enmeshed with one of the political question tests. That is the case here. The free instruction clause does not mandate equal funding of schools. As noted, there is no uniformity clause in the Nebraska Constitution, and there is no other provision specifying the manner or amount of school funding that must be provided for schools. Instead, the Nebraska Constitution commits funding decisions to the Legislature.[88] The Legislature, in turn, has entrusted local budget decisions to the school boards.[89] Holding that the Nebraska Constitution provides a fundamental right to equal school funding of schools would affect discretionary legislative decisions at both local and state levels. So, the same prudential considerations that weighed against interfering with the Legislature's determinations of adequate school funding are implicated by the Coalition's equal funding claim. We conclude that the free instruction clause does not provide a fundamental right to equal and adequate funding of schools.

[27,28] As noted, the Legislature has statutorily delegated to school boards the duty to determine which schools to operate.[90] School boards also have authority to determine, with the consent and advice of the State Department of Education, which grades to offer at schools.[91] In constitutional challenges to school funding decisions, we conclude that the appropriate level of scrutiny is whether the challenged school funding decisions are rationally related to a legitimate government purpose.

(d) The School Board's Actions Were Rationally Related to a Legitimate Government Purpose

The Coalition does not contest whether the school board's actions were rationally related to a legitimate government interest. The thrust of its argument is that the Nebraska Constitution

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[88] See *Nebraska Coalition for Ed. Equity v. Heineman, supra* note 7.

[89] See *Werth v. Buffalo County Board of Equalization*, 187 Neb. 119, 188 N.W.2d 442 (1971).

[90] § 79-1094.

[91] § 79-526.

provides a fundamental right to equal and adequate educational funding, an argument which we reject. The school district contends that its actions to reduce costs, including adjusting its classes so that small classes could be combined, were rationally related to its goal of providing an education for its students. We agree.

At the temporary injunction hearing, Forsberg, the superintendent, was asked during cross-examination why the board had not chosen to save money by transporting the students from Lyons to Decatur. He responded that the board had considered that possibility. But because the secondary school was at Lyons, the Lyons facility had to be heated and operated anyway. He stated that because there were more students at Lyons than at Decatur, two busses, instead of one, would be required to transport students from Lyons to Decatur. He also said that the remaining students at Decatur in grades kindergarten through three would be taught in one "K-3 center," allowing the district to reduce staff costs and reduce heating and maintenance costs, for a total savings of about $200,000. Because the school board was confronted with increasing budget deficits, we conclude that its actions were rationally related to its legitimate goal of providing an education to all children in the district. Because the Coalition has failed to show that a heightened level of scrutiny applies to the school district's decisions or that those decisions were not rationally related to a legitimate government purpose, its substantive due process claim must fail.

4. Equal Protection

[29-32] The Nebraska Constitution and the U.S. Constitution have identical requirements for equal protection challenges.[92] And we have specifically held that the action of a school board may implicate the Equal Protection Clause.[93] The Equal Protection Clause requires the government to treat similarly

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[92] *Kenley v. Neth*, 271 Neb. 402, 712 N.W.2d 251 (2006).

[93] *Maack v. School Dist. of Lincoln*, 241 Neb. 847, 491 N.W.2d 341 (1992), citing *Columbus Board of Education v. Penick*, 443 U.S. 449, 99 S. Ct. 2941, 61 L. Ed. 2d 666 (1979).

situated people alike.[94] It does not forbid classifications; it simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike.[95]

[33,34] If a legislative classification involves either a suspect class or a fundamental right, courts will analyze the classification with strict scrutiny.[96] A suspect class is one that has been "'saddled with such disabilities, or subjected to such a history of purposeful unequal treatment . . . as to command extraordinary protection from the majoritarian political process.'"[97] The Coalition does not allege that the school district discriminated against a "suspect class." And we have already determined that the Nebraska Constitution does not provide a fundamental right to equal and adequate funding of schools.

[35,36] When a classification created by state action does not jeopardize the exercise of a fundamental right or categorize because of an inherently suspect characteristic, the Equal Protection Clause requires only that the classification rationally further a legitimate state interest.[98] Under the rational basis test, whether an equal protection claim challenges a statute or some other government act or decision, the burden is upon the challenging party to eliminate any reasonably conceivable state of facts that could provide a rational basis for the classification.[99]

[37,38] "[T]he Equal Protection Clause does not require absolute equality or precisely equal advantages."[100] Social and economic measures violate the Equal Protection Clause only when the varying treatment of different groups or persons is

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[94] *Id.*, citing *Nordlinger v. Hahn*, 505 U.S. 1, 112 S. Ct. 2326, 120 L. Ed. 2d 1 (1992).

[95] *Gourley v. Nebraska Methodist Health Sys.*, 265 Neb. 918, 663 N.W.2d 43 (2003).

[96] *Id.* See *State v. Senters, supra* note 38.

[97] *State v. Michalski*, 221 Neb. 380, 386, 377 N.W.2d 510, 515 (1985), quoting *San Antonio School District v. Rodriguez, supra* note 41.

[98] See, *Maack v. School Dist. of Lincoln, supra* note 93, citing *Nordlinger v. Hahn, supra* note 94.

[99] *Smith v. City of Chicago*, 457 F.3d 643 (7th Cir. 2006). Compare *State v. Senters, supra* note 38.

[100] *San Antonio School District v. Rodriguez, supra* note 41, 411 U.S. at 24.

so unrelated to the achievement of any legitimate purposes that a court can only conclude that the Legislature's actions were irrational.[101]

As we did in our substantive due process analysis, we conclude that the school board has shown a rational basis for its actions. Therefore, the Coalition's equal protection claim must similarly fail.

V. CONCLUSION

We conclude that the district court did not err in determining that the voting restrictions placed in the reorganization petition were unenforceable under Neb. Rev. Stat. § 79-402 (Reissue 1981). The school board of the reorganized district, therefore, did not breach the reorganization petition by failing to obtain the specified votes before moving grades four through six from the Decatur school to the Lyons school.

We further conclude that the school board's actions did not violate the Coalition members' substantive due process or equal protection rights. The free instruction clause of the Nebraska Constitution does not confer a fundamental right to equal and adequate funding for schools. The Coalition has not claimed that the school board's actions discriminated against a suspect class. Thus, under the rational basis test, the school district, confronted with increasing budget deficits, has shown that its actions were rationally related to its legitimate goal of providing an education to all children in the district.

AFFIRMED.

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[101] *Gourley v. Nebraska Methodist Health Sys., supra* note 95; *State v. Atkins*, 250 Neb. 315, 549 N.W.2d 159 (1996).

STATE OF NEBRASKA, APPELLEE, V. ROBERT J. NELSON, APPELLANT.
739 N.W.2d 199

Filed October 5, 2007. No. S-06-449.

1. **Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.

2. **Effectiveness of Counsel: Appeal and Error.** Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact. When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error. With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an appellate court reviews such legal determinations independently of the lower court's decision.
3. **Constitutional Law: Statutes: Appeal and Error.** The constitutionality of a statute is a question of law, regarding which the Nebraska Supreme Court is obligated to reach a conclusion independent of the determination reached by the trial court.
4. ____: ____: ____. For the constitutionality of a statute to be genuinely involved in an appeal, within the meaning of Neb. Rev. Stat. § 24-1106(1) (Reissue 1995), the constitutional issue must be real and substantial; not merely colorable.
5. **Constitutional Law: Claims.** For a constitutional claim to be "real and substantial," the contention must disclose a contested matter of right, which presents a legitimate question involving some fair doubt and reasonable room for disagreement.
6. **Constitutional Law: Statutes: Rules of the Supreme Court: Notice: Appeal and Error.** A litigant presenting a real and substantial challenge to the constitutionality of a statute is still required by Neb. Ct. R. of Prac. 9E (rev. 2006) to provide notice of that constitutional issue so that a preliminary inquiry into the claim may be conducted, and so the Nebraska Supreme Court can exercise its authority to regulate the dockets of the appellate courts of this state.
7. **Effectiveness of Counsel: Proof.** To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must first show that counsel's performance was deficient and second, that this deficient performance actually prejudiced his or her defense.
8. ____: ____. To demonstrate that his or her counsel's performance was deficient, a defendant must show that counsel did not perform at least as well as a criminal lawyer with ordinary training and skill in the area.
9. **Effectiveness of Counsel: Proof: Words and Phrases.** To prove prejudice for a claim of ineffective assistance of counsel, the defendant must show there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Petition for further review from the Court of Appeals, CARLSON, MOORE, and CASSEL, Judges, on appeal thereto from the District Court for Douglas County, PETER C. BATAILLON, Judge. Judgment of Court of Appeals affirmed.

Daniel W. Ryberg for appellant.

Jon Bruning, Attorney General, James D. Smith, and, on brief, Susan J. Gustafson for appellee.

HEAVICAN, C.J., WRIGHT, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

GERRARD, J.

NATURE OF CASE

Robert J. Nelson was convicted of making terroristic threats in violation of Neb. Rev. Stat. § 28-311.01 (Reissue 1995). On appeal, Nelson argued that his trial counsel was ineffective for failing to challenge the constitutionality of § 28-311.01. The Nebraska Court of Appeals determined that it did not have jurisdiction to decide whether Nelson's trial counsel was ineffective because in order to do so, it would be required to determine the constitutional validity of the statute, and the Nebraska Supreme Court has exclusive jurisdiction to decide cases involving the constitutionality of a statute.[1] The issue presented in this appeal is whether the Court of Appeals had jurisdiction to decide Nelson's ineffective assistance of counsel claim.

STATEMENT OF FACTS

Nelson had been in a relationship with his girlfriend for approximately 4 years. Nelson's girlfriend testified that in June 2005, she and Nelson were living together, but had agreed, at her urging, to end their relationship. On the morning of June 11, Nelson woke his girlfriend up and began talking about how he did not want the relationship to end. His girlfriend testified that she got up to get dressed so she could leave the apartment, but Nelson began grabbing at her clothes in an attempt to stop her from getting dressed and leaving. Nelson's girlfriend explained that she tried to use the desk telephone to call the 911 emergency dispatch service, but Nelson disabled the desk telephone and later smashed her cellular telephone against the wall.

Nelson's girlfriend testified that she was able to get dressed, but as she did so, Nelson returned to the room with a steak knife in his hand. She testified that Nelson "jamm[ed] the knife into the TV" and told her that this was "the date that [she] was

[1] See, Neb. Const. art. V, § 2; Neb. Rev. Stat. § 24-1106(1) (Reissue 1995).

going to die, and the only way [she] was going to leave this apartment was in a body bag." Nelson's girlfriend testified that she thought Nelson was going to kill her. Eventually, she was able to leave and contact the police.

Nelson was eventually charged with, and convicted of, making terroristic threats in violation of § 28-311.01 and use of a deadly weapon to commit a felony in violation of Neb. Rev. Stat. § 28-1205 (Reissue 1995). Nelson, represented by different counsel, appealed his convictions to the Court of Appeals. Nelson argued that his trial counsel provided ineffective assistance of counsel for failing to object to the constitutionality of § 28-311.01(1). Specifically, Nelson contended that § 28-311.01(1) is unconstitutional in that it fails to define the term "terror." Nelson also argued that his trial counsel was ineffective for failing to object to certain definitions given in the jury instructions.

Upon filing his direct appeal brief, Nelson also filed a rule 9E[2] notice claiming that this case involved the constitutionality of § 28-311.01. This court did not remove the case to its docket, and the appeal was submitted to the Court of Appeals. In a memorandum opinion filed on February 7, 2007, the Court of Appeals affirmed Nelson's convictions and sentences, but did not address Nelson's argument that his trial counsel was ineffective for failing to object to the constitutionality of § 28-311.01. The Court of Appeals explained that it could not "determine whether Nelson's trial counsel was ineffective in failing to raise the constitutionality of § 28-311.01(1) because doing so would require [the Court of Appeals] to determine the constitutionality of a statute, which [it] cannot do."

Nelson petitioned for further review, which we granted. We limited our review to the issue of whether the Court of Appeals erred in concluding that it did not have jurisdiction to address Nelson's claim that his trial counsel was ineffective for failing to challenge the constitutionality of § 28-311.01(1).

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[2] Neb. Ct. R. of Prac. 9E (rev. 2006).

ASSIGNMENT OF ERROR

Nelson assigns, restated, that the Court of Appeals erred in declining to address his allegation that his trial counsel was ineffective for failing to object to the constitutionality of § 28-311.01(1).

STANDARD OF REVIEW

[1] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.[3]

[2] Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact. When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error. With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*,[4] an appellate court reviews such legal determinations independently of the lower court's decision.[5]

[3] The constitutionality of a statute is a question of law, regarding which the Nebraska Supreme Court is obligated to reach a conclusion independent of the determination reached by the trial court.[6]

ANALYSIS

Jurisdiction of Court of Appeals

Pursuant to § 24-1106(1), cases "involving the constitutionality of a statute" bypass the Court of Appeals and are taken directly to the Nebraska Supreme Court.[7] The issue presented in this appeal is whether the Court of Appeals has jurisdiction to decide an ineffective assistance of counsel claim where the allegation is based on trial counsel's failure to challenge the constitutionality of a statute. Stated another way, the question

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[3] *State v. Merrill*, 273 Neb. 583, 731 N.W.2d 570 (2007).

[4] *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

[5] *State v. Sims*, 272 Neb. 811, 725 N.W.2d 175 (2006).

[6] *State v. Marrs*, 272 Neb. 573, 723 N.W.2d 499 (2006).

[7] See, also, Neb. Const. art. V, § 2.

presented is whether, under limited circumstances, an appellate challenge to the constitutionality of a statute may be within the jurisdiction of the Court of Appeals.

Under the Nebraska Constitution, an act of the Legislature cannot be declared unconstitutional, except by the concurrence of five judges of the Nebraska Supreme Court.[8] The obvious intent of § 24-1106(1) was to bring such constitutional issues to the Supreme Court. But we do not read § 24-1106(1) to require that all constitutional arguments, no matter how insubstantial, bypass review by the Court of Appeals.

[4,5] Instead, we conclude that the mere assertion that a statute may be unconstitutional does not automatically deprive the Court of Appeals of jurisdiction over the case. To conclude otherwise would amount to ceding the regulation of our docket, and that of the Court of Appeals, to the unsupported allegations of litigants. We find that for the constitutionality of a statute to be genuinely "involved" in an appeal, "'[t]he constitutional issue must be real and substantial; not merely colorable.'"[9] For a constitutional claim to be "real and substantial," the contention must disclose a contested matter of right, which presents a legitimate question involving some fair doubt and reasonable room for disagreement.[10]

[6] If a preliminary inquiry reveals that the contention is so obviously unsubstantial or insufficient, either in fact or in law, as to be plainly without merit, the claim is merely colorable. For example, where a law has been held to be constitutional by this court, as against the same attack being made, the case merely requires an application of unquestioned and unambiguous constitutional provisions, and jurisdiction of the appeal lies in the Court of Appeals.[11] To the extent that *Metro Renovation v.*

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[8] *Id.*

[9] *Wright v. Missouri Dept. of Social Services*, 25 S.W.3d 525, 528 (Mo. App. 2000). See, also, *Schumann v. Mo. Highway & Transp. Com'n*, 912 S.W.2d 548 (Mo. App. 1995).

[10] See *Wright v. Missouri Dept. of Social Services, supra* note 9.

[11] See *Zepp v. Mayor &c. City of Athens*, 255 Ga. 449, 339 S.E.2d 576 (1986). See, also, *Brooks v. Meriwether Memorial Hosp. Auth.*, 246 Ga. App. 14, 539 S.E.2d 518 (2000).

State[12] suggests otherwise, it is disapproved. A litigant presenting a real and substantial challenge to the constitutionality of a statute is still required, by rule 9E, to provide notice of that constitutional issue so that a preliminary inquiry into the claim may be conducted, and so this court can exercise its authority to regulate the dockets of the appellate courts of this state.

We conclude that the Court of Appeals had the authority, in this case, to consider Nelson's constitutional claim. As explained below, Nelson's claim is foreclosed by this court's precedent and is plainly without merit. The Court of Appeals erred in declining to address his argument. But because this is the first instance in which we have held that the Court of Appeals has jurisdiction to determine, in limited circumstances, whether the constitutionality of a statute is implicated and because Nelson's argument is meritless, the court's error was harmless.

Merits of Nelson's Ineffective Assistance of Counsel Claim

[7,8] While the Court of Appeals could have decided the merits of Nelson's ineffective assistance of counsel claim, it did not, and for the sake of judicial economy, we choose to do so here.[13] Nelson argues that his trial counsel was ineffective for failing to challenge the constitutionality of § 28-311.01. To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*,[14] the defendant must first show that counsel's performance was deficient and second, that this deficient performance actually prejudiced his or her defense.[15] To demonstrate that his or her counsel's performance was deficient, a defendant must show that counsel did not perform at least as well as a criminal lawyer with ordinary training and skill in the area.[16]

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[12] *Metro Renovation v. State*, 249 Neb. 337, 543 N.W.2d 715 (1996).

[13] See, *Hosack v. Hosack*, 267 Neb. 934, 678 N.W.2d 746 (2004); *DeBose v. State*, 267 Neb. 116, 672 N.W.2d 426 (2003).

[14] *Strickland v. Washington, supra* note 4.

[15] See *State v. Moyer*, 271 Neb. 776, 715 N.W.2d 565 (2006).

[16] See *id.*

[9] To prove prejudice, the defendant must show there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.[17]

Nelson contends that § 28-311.01 is unconstitutional because it fails to define the term "terror." As we read Nelson's argument, it appears he is challenging both subsections (1)(a) and (c) of the statute, as those are the only subsections that include a form of the word "terror." Section 28-311.01 provides in relevant part:

> (1) A person commits terroristic threats if he or she threatens to commit any crime of violence:
>
> (a) With the intent to terrorize another; [or]
>
> . . . .
>
> (c) In reckless disregard of the risk of causing such terror[.]

Both subsections (1)(a) and (c) have been subject to constitutional attacks in the past and have been upheld by this court as constitutional. In *State v. Schmailzl*,[18] § 28-311.01 was challenged as unconstitutionally vague and overbroad in that it failed to define what conduct constituted a threat. We rejected this argument and held that "the terroristic threats statute, § 28-311.01(1)(a) . . . is constitutional."[19]

Similarly, in *State v. Bourke*,[20] we held that § 28-311.01(1)(c) was constitutional. We concluded that "[s]ubsection (1)(c) of § 28-311.01 defines the crime with enough certainty [and] '"with sufficient definiteness and . . . ascertainable standards of guilt to inform those subject thereto as to what conduct will render them liable to punishment thereunder. . . ."'"[21] And again, in *State v. Mayo*,[22] we held that "as used in § 28-311.01(1)(c),

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[17] *State v. Rieger*, 270 Neb. 904, 708 N.W.2d 630 (2006).

[18] *State v. Schmailzl*, 243 Neb. 734, 502 N.W.2d 463 (1993).

[19] *Id.* at 742, 502 N.W.2d at 468.

[20] *State v. Bourke*, 237 Neb. 121, 464 N.W.2d 805 (1991).

[21] *Id.* at 125, 464 N.W.2d at 808.

[22] *State v. Mayo*, 237 Neb. 128, 129, 464 N.W.2d 798, 799 (1991).

the phrase 'reckless disregard of the risk of causing such terror or evacuation' is not unconstitutionally vague."

Also relevant to our analysis, although involving a different statute, is *State v. Holtan*.[23] In *Holtan*, we addressed a claim that the phrase "'serious assaultive or terrorizing criminal activity'" is unconstitutionally vague and indefinite.[24] We concluded, among other things, that the word "terrorizing" was a word in common usage with a meaning well fixed and generally clearly understood.[25]

We conclude, as dictated by our precedent, that "terror" and "terrorize" are words of common usage and meaning capable of being readily understood by an individual of common intelligence. Accordingly, we reaffirm our holding that § 28-311.01 is not unconstitutionally vague. The statute was sufficiently clear to make Nelson aware that his conduct, as described above, was unlawful. Nelson's counsel was not ineffective for failing to raise an argument that has no merit, nor was Nelson prejudiced by his counsel's failure to raise a meritless argument.

CONCLUSION

Although the Court of Appeals erred in not reaching the merits of Nelson's ineffective assistance of counsel claim, Nelson's claim is without merit and the Court of Appeals correctly affirmed Nelson's convictions and sentences. Although our reasoning differs from that of the Court of Appeals, the court's ultimate decision was correct, and accordingly, we affirm.[26]

AFFIRMED.

Connolly, J., participating on briefs.

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[23] *State v. Holtan*, 197 Neb. 544, 250 N.W.2d 876 (1977), *disapproved on other grounds, State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1986).

[24] *Id.* at 546, 250 N.W.2d at 879.

[25] *Id.* See, also, *Masson v. Slaton*, 320 F. Supp. 669 (N.D. Ga. 1970); *State v. Gunzelman*, 210 Kan. 481, 502 P.2d 705 (1972); *Com. v. Green*, 287 Pa. Super. 220, 429 A.2d 1180 (1981).

[26] See *State v. Marshall*, 269 Neb. 56, 690 N.W.2d 593 (2005).

DIANE C. SWEEM, APPELLANT, V. AMERICAN FIDELITY LIFE ASSURANCE COMPANY, A CORPORATION, APPELLEE.

739 N.W.2d 442

Filed October 5, 2007. No. S-06-870.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Insurance: Contracts.** An insurance policy is a contract, and its terms provide the scope of the policy's coverage.
4. **Summary Judgment.** Summary judgment proceedings do not resolve factual issues, but instead determine whether there is a material issue of fact in dispute.
5. **Trial: Juries: Evidence.** Where the facts are undisputed or are such that reasonable minds can draw but one conclusion therefrom, it is the duty of the trial court to decide the question as a matter of law rather than submit it to the jury for determination.
6. **Summary Judgment.** Where reasonable minds differ as to whether an inference supporting the ultimate conclusion can be drawn, summary judgment should not be granted.

Appeal from the District Court for Douglas County: J. MICHAEL COFFEY, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Richard J. Schicker for appellant.

William M. Lamson, Jr., and Craig F. Martin, of Lamson, Dugan & Murray, L.L.P., for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

STEPHAN, J.

American Fidelity Life Assurance Company (American Fidelity) discontinued benefits it had been paying to Diane C. Sweem under a group disability income policy, based upon its determination that Sweem was employable in some capacity

and therefore no longer totally disabled under the terms of the policy. Sweem, contending that she is still totally disabled and unable to work, brought this action for benefits under the policy and other relief based on multiple claims designated as separate "causes of action." The district court for Douglas County entered summary judgment in favor of American Fidelity, and Sweem perfected this appeal. We conclude that there are genuine issues of material fact which preclude summary judgment on Sweem's breach of contract claim, and therefore reverse, and remand for further proceedings. We affirm the judgment of the district court with respect to Sweem's remaining claims.

BACKGROUND

While employed as a teacher for the Fort Calhoun Public School District, Sweem enrolled in a group long-term disability income insurance policy offered through the school district and underwritten by American Fidelity. The policy included the following provisions:

> 1.09 "Total Disability" (or Totally Disabled) for the first twelve (12) months of disability means that the Insured is disabled and completely unable to do each and every duty of his employment. After that, "Total Disability" means the Insured is disabled and completely unable to engage in any occupation for wage or profit for which he is reasonably qualified by training, education, or experience.
>
> . . . .
>
> 3.01 Monthly Disability Benefits will be paid if an Insured is Totally Disabled as defined in Paragraph 1.09. . . . Benefits will be paid for each month Total Disability continues beyond the Elimination Period. No such benefits will be paid beyond the Maximum Disability Period stated in the Schedule [of Benefits].

The "twelve (12) months of disability" referred to in paragraph 1.09 was subsequently amended to "sixty (60) months." The maximum disability period is defined in the policy as "To age 65 or 5 years, whichever is greater, but not beyond age 70." Sweem was born on May 23, 1957.

In 1990, Sweem was injured in an accident unrelated to her work. She sought treatment from several health care providers,

including Dr. Michael McDermott, an oral and maxillofacial surgeon. McDermott examined Sweem and determined that she suffered from muscle spasms and a displaced disk in the temporomandibular joint of her jaw. McDermott initially recommended a course of conservative treatment and outpatient arthroscopic surgery. When this failed to provide satisfactory relief, McDermott performed open joint surgery. Sweem subsequently underwent additional surgical procedures.

In May 1992, Sweem filed a claim for disability benefits under the American Fidelity policy. On the initial claim form, Sweem identified only McDermott as her treating physician. McDermott completed the attending physician's portion of the claim form. Responding to the question of whether Sweem was "continuously totally disabled," McDermott indicated that she was unable to work from April 3, 1992, until "further notice." In July, American Fidelity approved Sweem's claim and began paying disability income benefits as of April 8.

Also in July 1992, Sweem completed a continuing disability benefits claim form provided by American Fidelity. In the attending physician's portion of that form, McDermott indicated that Sweem was not "totally disabled." However, he underlined the word "totally" on the form and below it wrote "partial yes." In August, McDermott completed another attending physician's statement form at the request of American Fidelity. In responding to the question of whether Sweem was "totally disabled," McDermott marked "Yes" but wrote "partially."

As a condition of receiving benefits, Sweem continued to complete continuing disability benefits forms as submitted to her by American Fidelity. McDermott periodically submitted an attending physician's statement on a form supplied by American Fidelity. On a form dated December 21, 1992, McDermott gave an affirmative response to the question whether Sweem was totally disabled for her regular occupation, but indicated that she was not totally disabled "for any occupation." McDermott responded similarly to these questions on subsequent continuing disability claim forms.

In 2001, American Fidelity began to question Sweem's eligibility for disability benefits. In October 2001, American Fidelity asked McDermott to complete a physical capacities

evaluation of Sweem on a form which it provided. On that form, McDermott indicated that in "an 8 hour workday," Sweem could sit for 7 hours, stand for 6 hours, and walk for 5 hours. McDermott also noted that Sweem could lift and carry some amount of weight and was, generally, not significantly restricted from other physical activities. In July 2002, an American Fidelity case manager wrote a letter to McDermott, asking, "[D]o you agree that . . . Sweem can return to work in another occupation?" McDermott gave an affirmative response, subject to the limitation that she was not to lift more than 25 pounds overhead.

In August 2002, American Fidelity commissioned a vocational evaluation and skills assessment of Sweem. The vocational consultant concluded that based on Sweem's education and experience and McDermott's evaluation, she had the "physical ability to resume employment in a position less physically demanding than her previous job." In September, the same consultant compiled a labor market survey in which she determined that there were nonteaching employment opportunities for Sweem within the Omaha, Nebraska, area. American Fidelity terminated Sweem's disability benefits on November 13, 2002.

Sweem commenced this action. In her operative amended complaint, she sought recovery based upon theories of breach of contract, bad faith, and intentional and negligent infliction of emotional distress. American Fidelity answered, denying Sweem's allegations with respect to liability and asserting several affirmative defenses.

American Fidelity then moved for summary judgment. The district court conducted a hearing at which it received evidence, including McDermott's deposition and affidavits of an American Fidelity employee and attached portions of American Fidelity's claim file pertaining to Sweem. In opposition to the motion, Sweem offered her own affidavit and deposition, another deposition given by McDermott, and the deposition of the American Fidelity employee. This evidence was received without objection. Sweem also offered the affidavit of Jane Yaffe-Rowell, to which was attached Yaffe-Rowell's employability assessment report pertaining to Sweem dated March 21, 2006, signed by her and Karen Stricklett, president of Stricklett & Associates,

Inc. American Fidelity asserted foundational and hearsay objections to this evidence. The court overruled the objections and received the evidence, but indicated that it would not consider any hearsay contained therein. In her report, Yaffe-Rowell, a rehabilitation consultant associated with Stricklett & Associates, stated that based upon the employability assessment which she performed in March, it was her opinion "with a reasonable degree of vocational certainty" that from November 13, 2002, to the present, Sweem was physically unable to perform the requirements of her previous work "or any other work that exists in the local or national economy."

In an order granting American Fidelity's motion for summary judgment and dismissing Sweem's complaint, the district court concluded:

> At the time the benefits were terminated by [American Fidelity], the only reasonable evidence available to [it] was the evidence previously considered on the initial Motion for Summary Judgment, but this did not include the March 21, 2006 Employability Assessment done by [Sweem's rehabilitation consultants]. However, that assessment is irrelevant to the issues raised by [Sweem] in the Second Amended Complaint as it only became available to [American Fidelity] three [and] one-half years after the original benefits were terminated. Therefore, [that evidence] cannot constitute a basis for a determination that [American Fidelity] on November 13, 2002, breached the contract with [Sweem] or that the termination was done in bad faith or in such a way as it negligently or intentionally inflicted emotional distress upon . . . Sweem. The evidence upon which the termination of benefits was based left no reasonable issue as to whether or not [American Fidelity] should have terminated them.

Sweem perfected this appeal, which we moved to our docket on our own motion pursuant to our authority to regulate the caseloads of the appellate courts.[1]

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[1] See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

ASSIGNMENTS OF ERROR

Sweem assigns, restated and reordered, that the district court erred (1) in failing to consider the report prepared by Sweem's rehabilitation consultants, (2) in finding that the insurance policy limited the time in which Sweem could submit evidence of her continued disability to American Fidelity after it denied benefits, and (3) in finding that no genuine issue of material fact existed on whether Sweem was totally disabled.

STANDARD OF REVIEW

[1,2] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[2] In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.[3]

ANALYSIS

Breach of Contract Claim

[3] An insurance policy is a contract, and its terms provide the scope of the policy's coverage.[4] Sweem's claim that American Fidelity breached its contract by discontinuing payment of disability benefits due under the policy rests upon a single question of fact: whether she was "totally disabled" as defined by the policy when American Fidelity stopped paying her disability benefits in November 2002. Because more than 60 months had elapsed from the commencement of disability, Sweem would be considered totally disabled under the policy if she were "completely unable to engage in any occupation for wage or profit for which [s]he is reasonably qualified by training, education, or experience."

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[2] *Stevenson v. Wright*, 273 Neb. 789, 733 N.W.2d 559 (2007).

[3] *Id.*

[4] *Sayah v. Metropolitan Prop. & Cas. Ins. Co.*, 273 Neb. 744, 733 N.W.2d 192 (2007).

[4-6] We have often noted that summary judgment proceedings do not resolve factual issues, but instead determine whether there is a material issue of fact in dispute.[5] Where the facts are undisputed or are such that reasonable minds can draw but one conclusion therefrom, it is the duty of the trial court to decide the question as a matter of law rather than submit it to the jury for determination.[6] But where reasonable minds differ as to whether an inference supporting the ultimate conclusion can be drawn, summary judgment should not be granted.[7]

As the party moving for summary judgment, American Fidelity was required to produce enough evidence to demonstrate that it was entitled to judgment if the evidence were uncontroverted at trial.[8] This required a showing that Sweem was able "to engage in any occupation for wage or profit for which [s]he is reasonably qualified by training, education, or experience," and therefore not "totally disabled" as defined by the policy. American Fidelity met this prima facie burden by offering McDermott's statements, indicating that Sweem was not totally disabled "for any occupation," and the vocational evaluation and labor market survey, indicating that Sweem was physically able to work in various available positions which were less physically demanding than her former position.

The burden then shifted to Sweem to produce evidence showing the existence of a genuine issue of material fact that would prevent judgment as a matter of law.[9] She offered her own affidavit in which she stated that she suffered from degenerative bone and joint disease, that she was unable to have a conversation for more than one-half hour without her jaw's locking and severe

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[5] *Strong v. Omaha Constr. Indus. Pension Plan*, 270 Neb. 1, 701 N.W.2d 320 (2005).

[6] *Bates v. Design of the Times, Inc.*, 261 Neb. 332, 622 N.W.2d 684 (2001); *Fraternal Order of Police v. County of Douglas*, 259 Neb. 822, 612 N.W.2d 483 (2000).

[7] *Riesen v. Irwin Indus. Tool Co.*, 272 Neb. 41, 717 N.W.2d 907 (2006); *Sherrets, Smith v. MJ Optical, Inc.*, 259 Neb. 424, 610 N.W.2d 413 (2000).

[8] *Marksmeier v. McGregor Corp.*, 272 Neb. 401, 722 N.W.2d 65 (2006); *NEBCO, Inc. v. Adams*, 270 Neb. 484, 704 N.W.2d 777 (2005).

[9] *Id.*

pain in her jaw, and that she was unable to leave her home for more than 1 hour at a time. She stated that she was "not able to work at any employment." In her deposition, Sweem testified that she continues to have muscle spasms and "lock ups" in her jaw and is unable to blink one eye. She testified that she was always in some pain and can write or type for only short periods of time. She further testified that she sleeps only 3 to 4 hours at night and usually takes naps during the day to make up for lost sleep. She testified that she had never considered applying for a sedentary job because no physician had specifically told her that she could perform such work.

Sweem also offered a deposition of McDermott in which he described the injury to Sweem's temporomandibular joint as "one of the more severe types of injuries that I've seen in almost 30 years." He testified that while he had completed the attending physician's statements submitted to American Fidelity to the best of his ability, he had not determined whether Sweem could perform any particular job and did not feel qualified to make such determinations.

Sweem also offered the affidavit of rehabilitation consultant Yaffe-Rowell and the attached employability assessment dated March 21, 2006, signed by Yaffe-Rowell and Stricklett. As noted, Yaffe-Rowell concluded "with a reasonable degree of vocational certainty" that Sweem "continues to be incapable of performing any of her previous work or any other work that exists in the local or national economy." Although it received this exhibit over foundational and hearsay objections, the district court subsequently disregarded it as "irrelevant" because it was not available to American Fidelity at the time it discontinued Sweem's disability benefits. We agree with Sweem that this was error. While the fact that American Fidelity did not have this document when it discontinued Sweem's benefits may weigh against Sweem's claims that it acted negligently or in bad faith in doing so, it is clearly relevant to the dispositive factual issue in Sweem's breach of contract claim, i.e., whether she remained totally disabled, as defined in the policy, at the time of discontinuation of her benefits.

In urging that the district court properly disregarded this evidence, American Fidelity argues that Sweem "closed the

administrative record when she chose to file suit."[10] It argues that although this is not a case arising under the Employee Retirement Income Security Act of 1974 (ERISA),[11] ERISA principles limiting or prohibiting consideration of evidence which was not considered by a plan administrator are "logically applicable."[12] American Fidelity further argues that Sweem's counsel was invited to submit additional evidence after disability benefits were discontinued, but chose not to do so and filed suit instead.

We find no merit in these arguments. We discern no good reason to apply ERISA principles to this common-law action to recover benefits claimed due under an insurance policy, and American Fidelity directs us to no other state court decision which has done so. There is no claim that Sweem failed to comply with the notice of claim or proof of loss provisions of the policy. Indeed, based upon the information Sweem and her physicians provided, American Fidelity paid disability benefits for more than 10 years. It then discontinued such benefits, based in part upon the opinion of a vocational rehabilitation expert whom it retained. Sweem did not accept this determination, filed this action, and retained an expert whose opinion differed from that of American Fidelity's expert. We find nothing in the insurance policy or the applicable law which precluded her from doing so. The Yaffe-Rowell affidavit and report should have been considered by the trial court with respect to Sweem's breach of contract claim. That report, together with Sweem's affidavit and deposition testimony, established the existence of a genuine issue of material fact as to whether Sweem was totally disabled as defined by the policy when American Fidelity discontinued its payment of benefits. In circumstances such as these, where there is conflicting evidence on the question of whether an insured is "disabled" within the meaning of an insurance policy, we have held that neither party is entitled to summary judgment.[13] The

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[10] Brief for appellee at 9.

[11] See 29 U.S.C. §§ 1001 to 1461 (2000 & Supp. IV 2004).

[12] Brief for appellee at 9.

[13] *Knudsen v. Mutual of Omaha Ins. Co.*, 257 Neb. 912, 601 N.W.2d 725 (1999).

district court erred in entering summary judgment for American Fidelity on this claim.

Other Claims

The entry of summary judgment also resulted in dismissal of Sweem's claims based upon alleged bad faith, as well as negligent and intentional infliction of emotional distress. Sweem did not assign or argue error with respect to the dismissal of these claims. Accordingly, we find no error in the dismissal of these claims.

CONCLUSION

Because Sweem does not raise any issue on appeal with respect to the dismissal of her claims based upon bad faith, negligent infliction of emotional distress, and intentional infliction of emotional distress, we affirm the entry of summary judgment as to those claims. However, for the reasons discussed, we conclude that the district court erred in entering summary judgment in favor of American Fidelity with respect to Sweem's breach of contract claim. We therefore remand that cause to the district court for further proceedings consistent with this opinion.

Affirmed in part, and in part reversed and remanded for further proceedings.

Betty L. Thorson, appellant, v. Nebraska Department of Health and Human Services, Nancy Montanez, director, appellee.

740 N.W.2d 27

Filed October 19, 2007. No. S-06-223.

1. **Administrative Law: Judgments: Appeal and Error.** A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record.
2. ____: ____: ____. When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is not arbitrary, capricious, or unreasonable.

3. **Judgments: Appeal and Error.** Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court.
4. **Appeal and Error.** An appellate court will not consider an issue on appeal that was not passed upon by the trial court.

Appeal from the District Court for Lancaster County: STEVEN D. BURNS, Judge. Affirmed.

Steven E. Gunderson, of Gunderson Law Offices, P.C., L.L.O., for appellant.

Jon Bruning, Attorney General, John L. Jelkin, and Douglas D. Dexter for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MCCORMACK, J.

NATURE OF CASE

Betty L. Thorson applied with the Nebraska Department of Health and Human Services (DHHS) for medical assistance benefits known as Aid to the Aged, Blind, and Disabled (AABD) and Medicaid. DHHS determined that based on the value of Thorson's irrevocable trust for which Thorson is the beneficiary, Thorson was ineligible for AABD and Medicaid benefits.

BACKGROUND

On December 2, 1989, Thorson executed the "Irrevocable Betty Lou Thorson Trust" (the Trust). Thorson is the grantor and beneficiary of the corpus of the Trust, and her son is the trustee. The Trust was established as an irrevocable instrument. It authorizes the trustee, in his sole and absolute discretion, to pay to or apply for the benefit of Thorson such amounts from the principal or income of the Trust as he deems necessary or advisable for the satisfaction of Thorson's special needs. Special needs are referred to in the Trust as "the requisites for maintaining [Thorson's] good health, safety and welfare when, in the sole and absolute discretion of the Trustee, such requisites are not being adequately provided by any public agency, office or department of any State, or of the United States." The Trust further provides that the express purpose of the Trust is that "the

income and principal hereof be used only to supplement other benefits received by or available to [Thorson]."

On December 19, 2003, Thorson applied for AABD and Medicaid benefits with DHHS. Thorson had previously been denied assistance benefits on four prior occasions, the last occasion because her resources exceeded the program standard. Attached to Thorson's application for assistance was an accounting of the Trust's assets, which totaled $69,740.68.

After an administrative hearing on the matter, the director of DHHS affirmed DHHS' denial of Thorson's application for benefits. The director of DHHS specifically found that the finding that Thorson was ineligible for AABD and Medicaid benefits due to resources in the Trust was correct.

Thorson filed a petition for review of the DHHS decision pursuant to the Administrative Procedure Act (APA). Thorson alleged that the determination that her resources exceed the program's standard is unsupported by the evidence and is contrary to law. The district court affirmed the ruling of the director, concluding that it was proper for DHHS to consider the Trust as an available asset for purposes of determining Thorson's assistance eligibility. Thorson filed this timely appeal.

ASSIGNMENT OF ERROR

Thorson asserts that the district court erred in determining that assets held in the Trust were available resources in determining Thorson's eligibility to receive AABD and Medicaid benefits.

STANDARD OF REVIEW

[1-3] A judgment or final order rendered by a district court in a judicial review pursuant to the APA may be reversed, vacated, or modified by an appellate court for errors appearing on the record.[1] When reviewing an order of a district court under the APA for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent

[1] *Pohlmann v. Nebraska Dept. of Health & Human Servs.*, 271 Neb. 272, 710 N.W.2d 639 (2006).

evidence, and is not arbitrary, capricious, or unreasonable.[2] Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court.[3]

ANALYSIS

We are presented in this appeal with the question of whether the corpus of an irrevocable, discretionary trust established in 1989 is a resource available to the beneficiary for purposes of determining the beneficiary's eligibility for AABD and Medicaid benefits.

In 1965, Congress enacted the Medicaid program as a cooperative federal-state program to provide health care to needy individuals.[4] Although participation in the Medicaid program is optional, once a state has voluntarily elected to participate, it must comply with standards and requirements imposed by federal statutes and regulations.[5] By enacting Neb. Rev. Stat. § 68-1018 et seq. (Reissue 2003, Cum. Supp. 2004 & Supp. 2005), Nebraska has elected to participate in the Medicaid program and has assigned to DHHS the responsibility of administering the program.[6]

Under federal law, a state participating in the Medicaid program must establish resource standards for the determination of eligibility.[7] These standards must take into account "'only such income and resources as are, as determined in accordance with standards prescribed by the Secretary [of the U.S. Department of Health and Human Services], available to the applicant or recipient.'"[8]

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[2] *Id.*

[3] *Id.*

[4] *Matter of Kindt*, 542 N.W.2d 391 (Minn. App. 1996). See, also, *Pohlmann v. Nebraska Dept. of Health & Human Servs., supra* note 1.

[5] *Pohlmann v. Nebraska Dept. of Health & Human Servs., supra* note 1.

[6] *Id.*

[7] *Id.*; 42 U.S.C. § 1396a(a)(17)(B) (2000).

[8] *Pohlmann v. Nebraska Dept. of Health & Human Servs., supra* note 1, 271 Neb. at 276, 710 N.W.2d at 643 (quoting § 1396a(a)(17)(B)).

Prior to 1986, an irrevocable trust was not considered an asset in determining whether an applicant was sufficiently needy to qualify for Medicaid benefits.[9] This created a situation whereby many individuals created trusts in order to shield their assets. And, as a result, many individuals were receiving Medicaid benefits when they had irrevocable trusts containing assets which would otherwise have made them ineligible for public assistance.[10]

"In 1986, Congress attempted to close the 'loophole' in the Medicaid act so that assets in certain trusts would be counted in determining whether a Medicaid applicant satisfied the maximum asset requirement."[11] The trusts set forth in the 1986 amendment were called Medicaid qualifying trusts.[12] The amendment established circumstances under which the assets of Medicaid qualifying trusts would be counted in determining the beneficiary's Medicaid eligibility.[13] The amendment was codified at § 1396a(k) and provided:

> (1) In the case of a medicaid qualifying trust . . . the amounts from the trust deemed available to a grantor . . . is the maximum amount of payments that may be permitted under the terms of the trust to be distributed to the grantor, assuming the full exercise of discretion by the trustee or trustees for the distribution of the maximum amount to the grantor. For purposes of the previous sentence, the term "grantor" means the individual referred to in paragraph (2).
>
> (2) For purposes of this subsection, a "medicaid qualifying trust" is a trust, or similar legal device, established (other than by will) by an individual (or an individual's spouse) under which the individual may be the beneficiary of all or part of the payments from the trust and the

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[9] *Boruch v. Nebraska Dept. of Health & Human Servs.*, 11 Neb. App. 713, 659 N.W.2d 848 (2003).

[10] *Id.*

[11] *Id.* at 717, 659 N.W.2d at 852.

[12] See § 1396a(k) (1988).

[13] *Boruch v. Nebraska Dept. of Health & Human Servs., supra* note 9.

> distribution of such payments is determined by one or more trustees who are permitted to exercise any discretion . . . .
>
> (3) This subsection shall apply without regard to—
>
> (A) whether or not the medicaid qualifying trust is irrevocable or is established for purposes other than to enable a grantor to qualify for medical assistance under this subchapter; or
>
> (B) whether or not the discretion described in paragraph (2) is actually exercised.
>
> (4) The State may waive the application of this subsection . . . where the State determines that such application would work an undue hardship.

In 1993, Congress repealed § 1396a(k) and adopted tighter restrictions under § 1396p(d). This amendment expanded the types of trusts which are counted in determining an applicant's Medicaid eligibility.[14] Under the plain language of § 1396p(d), if a person establishes an irrevocable trust with his or her assets and the individual is able, under any circumstances, to benefit from the corpus of the trust or income derived from the trust, the individual is considered to have formed a trust which is counted in the determination of Medicaid eligibility. The corpus of the trust is considered a resource available to the individual.[15] Although § 1396p(d) supersedes the Medicaid qualifying trust provisions set forth in § 1396a(k), § 1396p(d) does not apply to trusts created on or before August 10, 1993.[16] Thus, because the Trust in the present case was created in 1989, the 1993 amendment does not apply and we are governed by § 1396a(k). As explained by the Connecticut Supreme Court:

> Because the medicaid act specifically provides that states may base eligibility determinations *only* on income and resources that are "available" to the applicant within the meaning of the act; see 42 U.S.C. § 1396a (a)(17)(B); and

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[14] *Id.*

[15] *Id.*

[16] See Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 13611(e)(2)(C), 109 Stat. 627 (1993). See, also, *Ahern v. Thomas*, 248 Conn. 708, 733 A.2d 756 (1999).

> because § 1396p (d) does not apply to the trust at issue in the present case, the regulations and guidelines that implement § 1396p (d) also are not applicable to the trust at issue in the present case. Thus, we are not required to determine whether there are "any circumstances" under which the trust instrument provides the trustees with discretion to make payments of trust principal "for the benefit of" or "on behalf of" the plaintiff. Instead, all that we must determine is whether the trust instrument provides the trustees with discretion to distribute trust principal "*to the grantor*" within the meaning of § 1396a (k)(1).[17]

Under § 1396a(k)(2), an irrevocable trust established by an individual or his or her spouse is considered a Medicaid qualifying trust if the trustee could exercise any discretion in order to make payments from trust principal or income to the beneficiary.[18] In the present case, Thorson and DHHS agree that the Trust is a Medicaid qualifying trust.

Under § 1396a(k)(1), the amount of a Medicaid qualifying trust considered available to an applicant for purposes of determining eligibility for Medicaid benefits "'is the maximum amount of payments that may be permitted under the terms of the trust to be distributed to the grantor, assuming the full exercise of discretion by the trustee or trustees for the distribution of the maximum amount to the grantor.'"[19] The Nebraska Administrative Code similarly provides that for irrevocable trusts established before August 11, 1993, the maximum amount that could have been distributed from either the income or the principal is considered an available resource.[20]

Thus, in order to determine whether the Trust's assets are an available resource, we must determine the maximum amount of

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[17] *Ahern v. Thomas, supra* note 16, 248 Conn. at 721-22, 733 A.2d at 766 (emphasis in original).

[18] See, *Ramey v. Rizzuto*, 72 F. Supp. 2d 1202 (D. Colo. 1999); *Cohen v. Commissioner of the Division of Medical Assistance*, 423 Mass. 399, 668 N.E.2d 769 (1996).

[19] *Ahern v. Thomas, supra* note 16, 248 Conn. at 717, 733 A.2d at 763 (emphasis omitted).

[20] 469 Neb. Admin. Code, ch. 2, § 009.07A5f(1) (2005).

the Trust's assets the trustee could distribute under the terms of the Trust. DHHS argues that under the terms of the Trust, the trustee has the discretion to apply the trust income and corpus for the health, comfort, and support of Thorson where her needs are not being met by public assistance, which is the case here. Thorson, on the other hand, argues that the trustee does not have authority to do so. Thorson claims that the language of the Trust indicates the clear intent that the trust income and corpus be used only to supplement, not replace, other benefits received by or available to Thorson.

When the parties do not claim that the terms of a trust are unclear or contrary to the settlor's actual intent, the interpretation of a trust's terms is a question of law.[21] Regarding questions of law, an appellate court has an obligation to reach conclusions independent of those reached by the lower court.[22] Where the language of the trust is not clear, the rules of construction for interpreting a trust are applied; however, if the language clearly expresses the settlor's intent, the rules do not apply.[23] The primary rule of construction for trusts is that a court must, if possible, ascertain the intention of the testator or creator.[24]

The terms of the Trust are clear. It provides in relevant part:

> (A) Except as otherwise limited herein, during the lifetime of the Grantor, the Trustee shall pay to or apply for the benefit of the Grantor such amounts from the principal or income of the Trust, up to the whole thereof, as the Trustee, in his sole and absolute discretion, may from time to time deem necessary or advisable for the satisfaction of the Grantor's special needs. . . .
>
> As used in this Trust Agreement, "special needs" refers to the requisites for maintaining the Grantor's good health, safety and welfare when, in the sole and absolute discretion of the Trustee, such requisites are not being adequately provided by any public agency, office or department of

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[21] *In re Trust Created by Hansen, ante* p. 199, 739 N.W.2d 170 (2007).

[22] See *Zahl v. Zahl*, 273 Neb. 1043, 736 N.W.2d 365 (2007).

[23] *In re Wendland-Reiner Trust*, 267 Neb. 696, 677 N.W.2d 117 (2004).

[24] *Id.*

> any State, or of the United States. "Special needs" shall include, but not be limited to, the costs of shelter, medical and dental expenses (and/or insurance therefore), clothing costs, travel and entertainment charges, expenses incurred in connection with programs of training, education and treatment and charges for essential dietary needs.
>
> (B) This Trust is created expressly to provide for the Grantor's extra and supplemental care, maintenance and support, in addition to and over and above that provided through benefits she otherwise receives or may receive from any local, State or federal government, or from any private agency. It is the express purpose of this Trust that the income and principal hereof be used only to supplement other benefits received by or available to the grantor.

At the time the Trust was created, both federal and state statutory schemes allowed Medicaid claimants to become eligible for public assistance by entering into trust agreements making their assets legally unavailable to them. We conclude, however, that the Trust in question does not satisfy those federal and state statutes. Under the terms of the Trust, the trustee is authorized to pay to or apply for the benefit of Thorson the entirety of the Trust's assets in order to supplement any benefits Thorson may receive from any local, state, or federal government. As explained by other courts, the statutory definition of a Medicaid qualifying trust in § 1396a(k) "'does not require that a trustee have unbridled discretion, but indicates that *any* discretion to distribute assets is sufficient.'"[25] We cannot say that a distribution of the Trust's assets to Thorson if she were to receive any governmental assistance would be an abuse of the trustee's discretion. Accordingly, we cannot say that DHHS was wrong in determining that the assets of the Trust were an available resource.

[4] Thorson also argues that DHHS may not deny her benefits until it has exhausted its judicial remedies to determine whether

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[25] See *Allen v. Wessman*, 542 N.W.2d 748, 752 (N.D. 1996) (emphasis in original) (quoting *Gulick v. Dept. of Health & Rehab. Serv.*, 615 So. 2d 192 (Fla. App. 1993)).

the trustee has abused his discretion by refusing to distribute assets from the Trust to Thorson. The district court did not address this argument. Because an appellate court will not consider an issue on appeal that was not passed upon by the trial court, we do not address Thorson's argument.[26]

CONCLUSION

For the reasons discussed above, we affirm the decisions of the district court and DHHS.

AFFIRMED.

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[26] *In re Estate of Nemetz*, 273 Neb. 918, 735 N.W.2d 363 (2007).

IN RE INTEREST OF XAVIER H., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE AND CROSS-APPELLANT, V. KATIANNE S., APPELLANT AND CROSS-APPELLEE.

740 N.W.2d 13

Filed October 19, 2007. No. S-06-841.

1. **Juvenile Courts: Appeal and Error.** Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court's findings.
2. **Parental Rights: Proof.** Under Neb. Rev. Stat. § 43-292 (Reissue 2004), in order to terminate parental rights, the State must prove, by clear and convincing evidence, that one or more of the statutory grounds listed in this section have been satisfied and that the termination is in the child's best interests.
3. ____: ____. Until the State proves parental unfitness, the child and his or her parents share a vital interest in preventing erroneous termination of their natural relationship.
4. ____: ____. The fact that a child has been placed outside the home for 15 or more of the most recent 22 months does not demonstrate parental unfitness.
5. **Parental Rights.** The placement of a child outside the home for 15 or more of the most recent 22 months under Neb. Rev. Stat. § 43-292(7) (Reissue 2004) merely provides a guideline for what would be a reasonable time for parents to rehabilitate themselves to a minimum level of fitness.
6. **Constitutional Law: Parental Rights.** Whether termination of parental rights is in a child's best interests is not simply a determination that one environment or set of circumstances is superior to another, but it is instead subject to the overriding recognition that the relationship between parent and child is constitutionally protected.

7. **Parental Rights: Presumptions: Proof.** The presumption that the best interests of a child are served by reuniting the child with his or her parent is overcome only when the parent has been proved unfit.

Petition for further review from the Court of Appeals, CARLSON, MOORE, and CASSEL, Judges, on appeal thereto from the County Court for Dodge County, ROBERT O'NEAL, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

Richard Register and Christina C. Boydston, of Register Law Office, for appellant.

Jeri L. Grachek, Deputy Dodge County Attorney, for appellee.

HEAVICAN, C.J., WRIGHT, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MCCORMACK, J.

NATURE OF CASE

Katianne S. is the mother of Alita, born March 14, 2001; Kalila, born April 6, 2003; and Xavier, born May 12, 2004. Katianne's fitness as a mother to Alita and Kalila is not in question, and they remain with her in the family home in Fremont, Nebraska. Katianne's petition for further review asks that we evaluate the Nebraska Court of Appeals' decision to affirm the juvenile court's termination, under Neb. Rev. Stat. § 43-292(7) (Reissue 2004), of Katianne's parental rights to Xavier. The broader issue presented in this appeal is the extent to which the State must respect a parent's fundamental constitutional rights when terminating parental rights under § 43-292(7).

FACTS

BACKGROUND OF XAVIER'S ADJUDICATION

After Xavier's birth, Katianne immediately suspected that Xavier might have a milk allergy because he kept spitting up breast milk. Katianne's daughter, Kalila, had been born with reflux and allergies to soy and milk proteins and had shown similar symptoms. Katianne and Xavier were discharged from the hospital within 2 days, but Katianne continued to seek medical

care for Xavier's feeding problem, taking Xavier to his pediatrician several times a week.

Xavier was eventually diagnosed with a milk and soy protein intolerance and gastroesophageal reflux. From May 12 to July 23, 2004, Xavier was put on several different hypoallergenic formulas, but he continued to spit up frequently. He was gaining weight poorly and was very irritable. Katianne explained that Xavier's allergies and reflux problem were much more severe than her daughter Kalila's had been.

On July 23, 2004, Xavier was placed on a nasogastric feeding tube which would drip formula into his stomach at a slow rate to allow him to absorb the formula without spitting it up. The feeding tube was to be in place at all times. Xavier had to wear special mittens to keep from pulling it out. He would have to go to the hospital to have the tube reinserted if he pulled it out. The pump would "alarm every once in a while," and there was a list of procedures to determine the reason for the alarm. The bags of formula needed to be refilled as soon as they were empty, and periodic tubing changes were also required.

When Xavier was 2 weeks old, Katianne had gone back to work part time at a gas station. She explained that she soon began to suffer from postpartum depression, which was getting progressively worse. She did not seek professional help. Katianne had a history of depression as a teenager and of drug and alcohol abuse as a young adult. However, Katianne was an active member of Alcoholics Anonymous and had not had a drinking or drug abuse problem since at least 2000.

Xavier was cared for by his father or a sitter while Katianne was at work. Katianne became concerned over whether they could properly care for Xavier's special needs. According to Katianne, the pediatrician suggested temporary out-of-home care as a solution. Katianne testified that she contacted social services for assistance. Crystal Hestekind, a protection and safety worker for the Department of Health and Human Services (the Department), helped Katianne get some assistance through some community service agencies, but the Department initially refused out-of-home voluntary temporary placement.

On July 28, 2004, someone filed a report with the Department expressing concerns about Xavier's health and well-being. After

an investigation, the report was deemed to be unfounded. In discussions with Katianne about the report, Katianne again expressed to the Department her concern over Xavier's care while she was at work. Hestekind had Home Health Care increase its visitation to Katianne's home to three to four times per week to assist with weight checks and the pump. Hestekind explained that they were also encouraging Katianne to seek assistance for her postpartum depression, but, at that time, Katianne was reticent to take medication.

Hestekind explained that Katianne was not very successful in keeping in communication with Hestekind, and Xavier still was not gaining any weight. Hestekind testified that she had offered to set up commercial daycare with staff properly trained for Xavier's medical needs, but that Katianne had refused because of concerns about Xavier's becoming sick by being around other children. Hestekind later admitted that the daycare she had arranged for Katianne was closed during the evening hours that Katianne worked.

Because the situation was deteriorating, on August 9, 2004, Katianne and the Department agreed to a voluntary 1-month placement of Xavier outside the home. Xavier's condition improved in the foster home. On August 23, Katianne suffered what she described as a relapse. She drank half a bottle of whiskey, took "a bunch of pills," and was hospitalized for several days as a result.

Because Xavier still needed special care to be weaned from the feeding tube to the bottle, the Department asked Katianne and Xavier's father to sign a voluntary extension of the out-of-home placement. When Xavier's father refused to agree to the extension, Xavier was adjudicated, in accordance with Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2004), to be under the jurisdiction of the juvenile court due to the parents' failure to provide proper care. The petition for adjudication alleged that Xavier's parents did not feel they were capable of caring for Xavier while he had the feeding tube.

Compliance With Case Plan

Xavier was weaned from the feeding tube to the bottle, and his special needs largely resolved. However, his adjudication began

a process in which a case plan for reunification was developed by the Department for Katianne. According to the Department, Katianne was not to be reunited with Xavier until the goals of that plan were met. The goals of the case plan included maintaining steady employment, attending therapy, submitting to random urinalysis testing, attending parenting classes, presenting a budget and receipts for the timely payment of her bills, enhancing her time management skills, maintaining a healthy lifestyle, maintaining her home in a condition suitable for visits, engaging in positive family activities, maintaining communication with service providers, and cooperating with a family support worker to set up visitation with Xavier.

The initial visitation plan under the voluntary placement had been four 2-hour visits per week. As of September 9, 2004, when the Department asked Katianne and Xavier's father to sign a voluntary extension of that agreement, Katianne had not seen Xavier for 3 weeks. She had canceled her visits with Xavier for various reasons, including illnesses of her other children, and also, presumably, for reasons relating to her August 23 hospitalization. By November, after the adjudication, visitation was reduced to twice a week. Because of further missed visits, the frequency and number of which are not reflected in the record, Katianne's visits were reduced to once a week in January 2005.

The only visitation records submitted into evidence by the Department show that between June 1 and December 2, 2005, 48 out of 59 scheduled visits between Katianne and Xavier took place. Each visit lasted approximately 2 hours. Approximately 10 visits were missed, although several canceled visits were due to family members' being ill.

In accordance with the case plan, Katianne immediately began working with Lutheran Family Services to address substance abuse and mental health issues. After an initial evaluation, Lutheran Family Services recommended a 12-week individual and group outpatient therapy program for substance abuse. Katianne had successfully completed the program by the end of December 2004. Katianne also saw a psychiatrist at Lutheran Family Services, who prescribed antidepressants. Ongoing therapy to address general mental health issues was recommended in conjunction with her medication.

Debra Hallstrom was Katianne's therapist through Lutheran Family Services. Hallstrom testified that Katianne was fairly regular in her appointments with her. Still, by the end of December 2004, Katianne had three "late cancels" with the supervising psychiatrist who prescribed her antidepressants. In accordance with Lutheran Family Services' official policy, the three late cancels mandated that Katianne be discharged for all services provided by the program, including her therapy visits with Hallstrom. During her discharge, Katianne sought therapy outside of Lutheran Family Services.

In April 2005, Katianne was allowed back into the program at Lutheran Family Services. Katianne continued her therapy at Lutheran Family Services until October or November 2005, when she was again discharged for three late cancels with her supervising physician. Hallstrom testified that at the time of her discharge, Katianne had partially completed her therapy goals, such as "boundary issues" and "setting goals." Katianne was still working on issues relating to job stability, daycare, and her dependence on Social Security income. Katianne did not have the money to pay for daycare, and she could not rely on Xavier's father to take care of the children. Hallstrom explained that Katianne was not able to get to work when a child was sick, and because of unreliable childcare, this was causing problems with her employment. Although Katianne missed visits to her supervising physician, she did continue taking her antidepressant medication.

Katianne also worked with Raegen Yount, a family support worker, to try to reach the goals of her case plan. Yount instructed Katianne in a parenting course called "nurturing parenting." Katianne successfully completed the course in approximately 11 months. Yount described that 11 months was "on the high end" for completion of the course, but that Katianne was generally engaged and was good about completing her homework for the course.

Yount testified that she had less success in teaching Katianne to properly budget her finances. According to Yount, budgeting was just something Katianne was "not able to grasp." Yount opined that Katianne and Xavier's father were spending money on unnecessary items they could not afford. She pointed out that

they rented-to-own a dishwasher, washer and dryer, bunk beds for the girls, and a "fancy stereo," which stereo was apparently later returned at Yount's urging. Yount testified that Katianne paid her bills late and that family members had often been called upon to help Katianne with her rent or utility bills. Yount also noted the fact that a used van Katianne bought had been repossessed. While Katianne had not owned another vehicle, Yount considered this purchase unnecessary.

Yount supervised Katianne's visits with Xavier. She stated her general observation that Katianne's house was not organized. The master bedroom door would often be closed because of the disarray inside. There was clothing that had been thrown down the steps of the unfinished basement where the laundry room was located. The girls had colored on the walls of their bedroom.

Yount testified that some of Katianne's visits with Xavier went very well, and some went very badly. Yount testified that the recent second-year birthday party for Xavier at Katianne's home was "very, very nice." There was cake and pizza; they sang "Happy Birthday"; and there "wasn't a whole lot of chaos, a whole lot of screaming going on or anything."

Yount explained that, in contrast, in the last few months, there had been other times where the environment had been more noisy because of the girls' behavior and Katianne's trying to discipline them. Yount recounted an incident during a May 4, 2006, visit, when Katianne tried to discipline Kalila for refusing to put her clothes back on after Kalila had stripped and decided she wanted to take a bath. Yount stated that Katianne had redirected Kalila many times to the timeout chair, but, when describing Katianne's discipline skills, Yount stated:

> And that has always been a thing with Kati[anne] and [Xavier's father] is that they will say go to time out, but whether the time out is utilized at all, or even utilized correctly, is a challenge for them. They'll get parts of a time out right, but other parts they won't. . . . It was time after time. And I directed [Katianne] to just take [Kalila] to the room. And Kalila was just left there. No direction as to why she was going to her room and no direction as to why she should get out of her room.

Yount also testified as to an incident when Katianne was changing Xavier's diaper and Alita and Kalila were "in his face" and Kalila said something about Xavier's genital area. This, according to Yount, upset Xavier. Yount testified that the girls' crowding Xavier during diaper changes was a recurring problem. She did note, however, that during the last visit, Katianne did "prompt the girls to back up . . . without any guidance or anything." But she noted that, unfortunately, the girls did not back up and that Katianne simply finished changing Xavier without disciplining the girls.

Yount stated that on most visits, Katianne was attentive to Xavier and the girls. At times, Katianne would have had a bad day and would want to talk. On such occasions, Yount stated that Katianne would be sitting on the floor and would observe the children while she talked about herself. Yount testified that other than going to the park, Katianne did not plan structured activities such as doing a craft project or going to the library. Yount indicated that Katianne had kept in good contact with Xavier's physician to discuss his health, when that was an issue.

Yount noted that Katianne had missed visits with Xavier for various reasons. Sometimes the other children were sick. Sometimes Katianne had to work early. Yount explained that she and Katianne's case manager had refused Katianne's request on one occasion to have an extended visit with Xavier at an Omaha zoo when the Head Start program was offering free admission for the children. Yount explained that Katianne had given her only 1 day's notice of the request. Moreover, gas to drive to the zoo would cost money, Katianne still had to pay admission for herself, and Katianne had mentioned renting a stroller. Yount stated, "I had the concern about money because prior to that I know relatives had helped her pay bills. And so, I had a question as to why are we making these type [sic] of judgments." The girls eventually went to the zoo with someone else, and Katianne stayed home in order to be able to visit with Xavier.

Ann Paulson, a court-appointed special advocate, likewise observed many of Xavier's visits in Katianne's home. Paulson testified that Xavier would generally interact with his two sisters while at Katianne's home, play with toys, and have a snack.

Paulson described Kalila's temper tantrum during the May 4, 2006, visit that Yount had mentioned. Paulson explained that 3-year-old Kalila threw a tantrum when Katianne tried to keep Kalila from taking off all her clothes and her "pull-up." Paulson stated that Katianne repeatedly placed Kalila in a time-out chair when Kalila left the chair without Katianne's permission. Katianne did get Kalila's dress back on, but not the pull-up. Still, Paulson explained, "it went on for quite a lengthy time, and [Katianne] got very frustrated with the situation and kinda [sic] just gave up on not knowing what to do and how to handle her." Yount eventually called Kalila over to her, put on her "pull-up," and advised Katianne to put Kalila in her room, which she did.

Paulson noted that there was a flea infestation of Katianne's home in the fall of 2005. She also noted that on one visit in January 2006, she had not received a late message that Katianne was canceling visitation. Upon arrival to Katianne's home, Paulson could clearly see inside the house that it was in "complete turmoil, and there were clothes, boxes, and toys, and all kinds of possessions of all sorts laying all over the home." On three visits, she found that the girls' beds did not have any bedding on them, although she could not say whether that was because the bedding was being washed. With these exceptions, Paulson described Katianne's home as generally clean and ready for them to visit.

Michelle Barnett, the caseworker for the Department who prepared Katianne's case plan, testified that it was her opinion that Katianne had generally not followed through with the plan the Department had set for her. Barnett testified that Katianne had been "very good" in the area of remaining drug free. Nor had she had any problem taking her psychotropic medication "in quite some time." Barnett believed that Katianne had, with the exception of the flea incident, maintained the conditions of her home up to the Department's standards, and she did not find any reports that the home was "supposedly in disarray" to be of any concern. Katianne had remained in the same residence with her two other children during the entire time Barnett was on the case. Barnett recognized that Katianne had completed the psychological and parenting assessment and had "partially" completed the recommendations of her assessments.

Barnett described the case plan goal of positive family activities as "kinda [sic] like a half complete," explaining, "she attempts to go to the park and . . . she would put a swimming pool outside and try to get them out there in that way. However, some of the visitations are very chaotic . . . ." While Katianne had requested increased visitation, "with the chaos in the home," Barnett did not allow it. Visitation had been cut back to once a week because of "a consistent amount of visitations being cancelled, and to provide Xavier with the structure that he needs in the foster home and at the daycare setting." Barnett had told Katianne once that if she could provide consistent visitation that month, Barnett would increase it, "[a]nd [Katianne] was close, but not quite."

Barnett did not think that Katianne had successfully followed the budget developed with Yount's assistance. Moreover, she noted that although Katianne had been continuously employed, she had been employed at approximately 14 different jobs. Like Yount, Barnett disapproved of the "luxury" items Katianne had rented or purchased. Barnett also stated that Katianne's bank account was constantly overdrawn; that she could not "do a savings account"; that Katianne's family "is picking up the slack, paying bills"; that the telephone had been shut off and there was no cellular telephone; and that the van had been repossessed.

As to the case plan's goal of communication with the Department, Barnett stated that Katianne was inconsistent. In the beginning, Barnett explained, contact was "very good." Katianne had even told Barnett when would be good times to do random urinalysis testing on the father because Katianne was trying to help him stay sober. Contact had recently diminished, however.

Finally, Barnett testified that Katianne had not achieved the goal of time management. Nor did she believe that Katianne had completed the task of keeping people out of her home who would be a risk to her children. Barnett explained that Katianne still had some contact with Xavier's father. Barnett admitted that the only evidence of the father's danger to the children was Katianne's report that he had on previous occasions punched and kicked walls and that he had once threatened to kick Alita.

Evidence of Xavier's Best Interests

Barnett admitted that she had told Katianne that it would be difficult to terminate her parental rights because Katianne had completed parts of her plan. As Barnett explained: "She is sober and she is parenting two other kids in her home." Still, Barnett stated her opinion that termination of Katianne's parental rights was in Xavier's best interests because:

> We've already heard that Xavier can be fussy. [The foster mother] has called me numerous times where he has been screaming for hours at a time just because he is very smart, he is very strong willed, and he wants to get what he wants. And, I mean, I don't know that anybody can handle that, so there's things in that regard. He's difficult. [Katianne's] life is stressful. Things are not consistent in her home. The other two children are not well managed at this point. They need consistency and Kati[anne's] time and I don't feel that she can handle three children with their needs.

Barnett explained that Xavier's foster parents were unable to adopt Xavier because of their ages. There were four prospective adoptive placements for Xavier, one being an aunt and uncle on the father's side who lived in California with their three young children. Xavier had met the aunt and uncle during one weekend visit, and Barnett claimed that Xavier had bonded to them because "he talks to them twice a month on the phone, points to [the aunt] and calls her mommy, and can point to her in a booklet as his mother, and get excited and talk to her on the phone." Xavier had not bonded with any of the other prospective adoptive families. Barnett explained that after adoption, whether Xavier had any contact with his biological siblings would be "up to Katianne and whoever adopts him."

Xavier's foster mother testified Xavier was now a happy, healthy 2-year-old with age-appropriate development. The foster mother seemed to agree that he was "somewhat high maintenance," explaining:

> You know, I guess if I had more small children, you know, Xavier can be clingy, and when he is it's really hard to get him settled down, and if I had more little kids that I was having to — you know, get everybody to bed and baths on time and stuff, I think I would have a hard time getting

> everybody's needs met and keeping him calm. He wants to be picked up. He wants attention.

The foster mother testified that Xavier usually behaved "just fine" after his visits with Katianne, although on three occasions in August and September 2005, Xavier acted out by hitting or throwing toys after his visits. These episodes seem to correspond to a period where Xavier was generally experiencing more temper tantrums. The foster mother explained that the frequency of Xavier's temper tantrums had generally diminished since that time.

Katianne testified that she had ended her relationship with Xavier's father and that he no longer lived in her home. She still had some contact with him because of his relationship with his children. Katianne stated that she wished to move back to New Jersey, where her family and friends were, because she would have a network of support there. She testified that she was currently employed full time as a security guard and was trying to complete some online college courses. Katianne stated that although she had had several different jobs in the recent past, she had lost many of them when they conflicted with her children's needs. In the last couple of months, she had worked out an arrangement with another mother in her neighborhood to take turns babysitting while the other was at work. Katianne said that this arrangement was working out well and that she trusted the other mother with her children.

Katianne described the routine she had established for her girls, indicating that establishing a routine was something she had learned as a result of the parenting course and counseling. Katianne thought that the routine helped with the children's behavior. The routine included set mealtimes, snacks, naptime, playtime while Katianne did household chores, and a bath and bedtime routine which included television or stories.

Katianne explained that she believed it was in Xavier's best interests that her parental rights not be terminated:

> I believe my son should be with his mother. . . . He still recognizes me as mom. He still calls me mom. We walk up and down the street in front of the house and he points and says it's mom's house. Not just for the best interests of him, but for the other children also. For anyone whose

> [sic] ever had more than one child, and had to go to their own child or take their children to another child's funeral, that's how it will feel to my children. Not just me, but to my other two daughters, because it's not like they don't know them. It's not like they don't play together.

Katianne stated she is a single mother with no support system in Fremont and that although she was not wealthy, she had always met her children's needs. They had a home to live in, beds and bedding, food, and clothing. Katianne testified that she had made mistakes in the past but that she was working to fix those mistakes. Katianne noted that the uncle and aunt in California never acknowledged their niece, Xavier's sister, Kalila, on any occasion, including birthdays or Christmas. She doubted they would work to maintain a relationship between Xavier and the girls. Katianne stated that there was a possibility that in transitioning back to her home, she would take Xavier to a therapist, explaining, "I think therapy is a positive thing."

Clinical Parenting Evaluation

Pursuant to the case plan, Dr. Stephen Skulsky, a clinical psychologist, conducted a psychological evaluation of Katianne to determine her capacity to parent and conducted a parent bonding assessment with Kalila and Xavier. Skulsky's assessment showed that Katianne enjoyed family interactions. She was extroverted, had a strong interest in interpersonal relationships, and had a good knowledge of socially expected and conventional behaviors. She had good underlying empathic capacities. Katianne was also assessed as having a broad range of intellectual interests, "good reality testing," and "a good capacity to break situations apart and put them back together into a global or overall picture of what is occurring."

Skulsky concluded that Katianne was likely to be strongly bonded to her children. Also, she was able to talk about appropriate discipline for the different ages of her children and appropriate ways to show them affection, and was able to list some favorite foods, favorite activities, and developmental levels for all three of her children.

Skulsky's diagnostic impression of Katianne was "of an adjustment disorder with a mixture of upset feelings," which

was connected to Xavier's being taken from the home. Skulsky described Katianne's biggest fear as not getting Xavier back. Katianne had told Skulsky that her happiest times in her life was when all three children were together. Skulsky concluded that "[u]nder most circumstances, when not too strongly emotionally upset, [Katianne] is likely to be able to put her children's needs first. . . . When strongly emotionally stressed, she may be briefly unable to make appropriate judgments in handling her children. This constitutes a mild difficulty in [her] capacity to adequately parent."

In the bonding assessment, Skulsky stated that he observed that Katianne talked and played with the children in an age-appropriate manner, that she set appropriate verbal and behavioral limits for the children, and that she demonstrated a good capacity to be warm and engaging with the children. The children warmed up to Katianne as well.

Skulsky summarized in his report that Katianne could take care of and relate to her children in an appropriate manner. Because of limitations in her ability to set firm and consistent limits and make good judgments when too strongly stressed, Skulsky recommended ongoing courses of psychotherapy to further limit any concerns about difficulties in appropriate parenting.

Skulsky's testimony at the termination hearing clarified that Katianne's deficiencies could be adequately addressed by 6 to 18 months of therapy. He stated that they were "not the kind of more severe pervasive problems that some parents would have, where it would be years and years of therapy." Because by the time of the hearing Skulsky had not seen Katianne for approximately a year, Skulsky could not opine on whether she had adequately worked on her personality issues and underlying emotional struggles since his assessment.

Skulsky could opine that Katianne was bonded to Xavier. He could not opine on whether Xavier was deeply bonded to Katianne because such an evaluation could be made only through frequent observational visits, which he had not made. Skulsky stated that if Xavier had not bonded to Katianne, but had bonded to his foster family, then it would be difficult, after 18 months, to return to Katianne. It would, however, be equally

difficult for Xavier to leave his foster parents for an adoptive family to whom he was not yet bonded.

Katianne's Ongoing Counseling

After being discharged from Lutheran Family Services, Katianne sought the help of Cynthia Jane Cusick, a mental health counselor and therapist. Cusick testified that she had been counseling Katianne once a week for the past 6 months. Cusick described Katianne's primary issue as major chronic depression with "financial family stressors and economic stressors." Cusick explained that Katianne had made all but two of her scheduled appointments with her. One appointment was missed due to work, and the other one had been scheduled the night before the hearing, and had only been tentatively scheduled in case it was needed.

Cusick described that Katianne was doing well with her sobriety and that it was not a major issue. As to issues relating to her depression, Cusick testified that Katianne was making steady improvement in "baby steps." It would require lifetime intervention and treatment. Cusick believed that Katianne had been doing well raising Xavier's siblings. Cusick testified that having an intimate relationship with Xavier's father and letting him live in her house were "greater stressor[s] than all of the children put together." However, Katianne had ended her relationship with Xavier's father.

Termination of Parental Rights

After Xavier had been in foster care for 15 months, the Department abandoned its reunification plan and sought termination of Katianne's parental rights under § 43-292(6) and (7). Subsection (6) allows for termination if such termination is in the best interests of the child and reasonable efforts to preserve and reunify the family have failed to correct the conditions leading to the determination that the juvenile was as described by § 43-247(3)(a). Subsection (7) provides for termination if it is in the best interests of the child and the child has been in out-of-home placement for 15 or more of the most recent 22 months. Xavier's father voluntarily relinquished his parental rights at the beginning of the proceedings.

The State and the guardian ad litem argued for termination of Katianne's parental rights because Xavier deserved permanency and Katianne had failed to sufficiently follow her case plan. Both pointed out that Katianne could not budget her finances and had trouble keeping the same job. Both pointed out that Katianne's visits with Xavier were only once a week and that they had been reduced to once a week because she had missed visits.

The juvenile court specifically found that the Department had failed to prove that, after reasonable efforts to preserve and reunify the family, Katianne had failed to correct the conditions leading to the § 43-247(3)(a) adjudication. Thus, it refused to terminate under § 43-292(6). Instead, the court terminated Katianne's parental rights under § 43-292(7). The court's order did not specify the basis for its determination that termination was in Xavier's best interests.

Appeal to Court of Appeals

In a memorandum opinion filed on February 5, 2007, the Court of Appeals affirmed the termination of Katianne's parental rights. The court stated that it was undisputed that Xavier had been in out-of-home placement for 15 or more of the most recent 22 months and that children should not have to wait indefinitely for indefinite parental maturity. The Court of Appeals concluded that termination under § 43-292(7) was in Xavier's best interests, pointing out Katianne's deficiencies in meeting her case plan's goal of budgeting and stability in employment. Apparently in reference to Katianne's being discharged for late cancels from Lutheran Family Services, the Court of Appeals also noted that Katianne had not been consistent in attending therapy for her mental health needs. The Court of Appeals stated that Katianne had been inconsistent with visitation and had difficulty managing her household with the two other children. Finally, the Court of Appeals stated that Xavier's father was still present in Katianne's life and that he was a negative influence.

We granted Katianne's petition for further review.

ASSIGNMENTS OF ERROR

Katianne asserts that the juvenile court erred in (1) determining that her parental rights should be terminated pursuant to § 43-292(7), (2) determining that it would be in Xavier's best

interests to terminate Katianne's parental rights, (3) refusing to declare § 43-292(7) unconstitutional as violative of Katianne's fundamental substantive due process rights under the 14th Amendment, (4) not requiring the Department to prove noncompliance with a reasonably related rehabilitation plan prior to termination, and (5) not determining that the Department failed to prove by clear and convincing evidence the grounds for termination. The State cross-appeals, asserting that the juvenile court erred in failing to find that the State had proved that Katianne's parental rights should be terminated under § 43-292(6).

STANDARD OF REVIEW

[1] Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court's findings.[1]

ANALYSIS

[2] Under § 43-292, in order to terminate parental rights, the State must prove, by clear and convincing evidence, that one or more of the statutory grounds listed in this section have been satisfied and that the termination is in the child's best interests.[2] Katianne's parental rights were terminated under § 43-292(7). This court upheld the constitutionality of § 43-292(7) in *In re Interest of Ty M. & Devon M.*,[3] and we do not revisit that holding here. However, we do find that the juvenile court erred in finding termination to be in Xavier's best interests. Accordingly, we reverse.

The proper starting point for legal analysis when the State involves itself in family relations is always the fundamental constitutional rights of a parent.[4] The interest of parents in the care, custody, and control of their children is perhaps the oldest of the fundamental liberty interests recognized by the U.S. Supreme

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[1] *In re Interest of Jagger L.*, 270 Neb. 828, 708 N.W.2d 802 (2006).

[2] See *id.*

[3] *In re Interest of Ty M. & Devon M.*, 265 Neb. 150, 655 N.W.2d 672 (2003).

[4] See *In re Adoption of Victor A.*, 157 Md. App. 412, 852 A.2d 976 (2004).

Court.[5] "When the State initiates a parental rights termination proceeding, it seeks not merely to infringe that fundamental liberty interest, but to end it. 'If the State prevails, it will have worked a unique kind of deprivation.'"[6]

[3] That being so, the U.S. Supreme Court has been clear that the Due Process Clause of the U.S. Constitution would be offended "'[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness . . . .'"[7] "[U]ntil the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship."[8]

We have likewise said repeatedly that "[a] court may not properly deprive a parent of the custody of a minor child unless it is affirmatively shown that such parent is unfit to perform the duties imposed by the relationship, or has forfeited that right."[9] "'[N]ature demands that the right [to custody of the child] shall be in the parent, unless the parent be affirmatively unfit.'"[10]

[4,5] The fact that a child has been placed outside the home for 15 or more of the most recent 22 months does not demonstrate parental unfitness. Instead, as we explained in *In re Interest of Ty M. & Devon M.*,[11] the placement of a child outside the home for 15 or more of the most recent 22 months under § 43-292(7) "merely provides a guideline" for what would be a

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[5] *Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000).

[6] *Santosky v. Kramer*, 455 U.S. 745, 759, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982).

[7] *Quilloin v. Walcott*, 434 U.S. 246, 255, 98 S. Ct. 549, 54 L. Ed. 2d 511 (1978).

[8] *Santosky v. Kramer, supra* note 6, 455 U.S. at 760.

[9] *Gomez v. Savage*, 254 Neb. 836, 848, 580 N.W.2d 523, 533 (1998). See, also, e.g., *In re Guardianship of D.J.*, 268 Neb. 239, 682 N.W.2d 238 (2004); *In re Interest of Amber G. et al.*, 250 Neb. 973, 554 N.W.2d 142 (1996).

[10] *In re Guardianship of D.J., supra* note 9, 268 Neb. at 247, 682 N.W.2d at 245.

[11] *In re Interest of Ty M. & Devon M., supra* note 3.

reasonable time for parents to rehabilitate themselves to a minimum level of fitness.[12] As stated by the Supreme Judicial Court of Massachusetts,[13] regardless of whether the child has been in foster care for 15 out of the last 22 months, the State "always bears the burden of proving, by clear and convincing evidence, that a child is still in need of care and protection."[14] This burden, the court explained, "necessarily involves showing that the parent is still unfit and the child's best interests are served by remaining removed from parental custody."[15]

[6,7] Section 43-292 nowhere expressly uses the term "unfitness," but that concept is encompassed by the fault and neglect described in subsections (1) through (6), where applicable, and, for all subsections, by a determination of the child's best interests. Although the name of the "'best interest of the child'" standard may invite a different "'intuitive'" understanding, "[t]he standard does not require simply that a determination be made that one environment or set of circumstances is superior to another."[16] Rather, as we have explained, "the '"best interests" standard is subject to the overriding recognition that the "relationship between parent and child is constitutionally protected."'"[17] There is a "rebuttable presumption that the best interests of a child are served by reuniting the child with his or her parent."[18] Based on the idea that "fit parents act in the best interests of their children,"[19] this presumption is overcome only when the parent has been proved unfit.

In this case, it is clear that the State has failed to consider Katianne's commanding interests and has failed to rebut the

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[12] *Id.* at 174-75, 655 N.W.2d at 692.

[13] *In re Erin*, 443 Mass. 567, 823 N.E.2d 356 (2005).

[14] *Id.* at 568, 823 N.E.2d at 359.

[15] *Id.* at 572, 823 N.E.2d at 361.

[16] *In re Yve S.*, 373 Md. 551, 565, 819 A.2d 1030, 1038 (2003).

[17] *In re Guardianship of D.J., supra* note 9, 268 Neb. at 246-47, 682 N.W.2d at 245.

[18] *Id.* at 244, 682 N.W.2d at 243.

[19] *Troxel v. Granville, supra* note 5, 530 U.S. at 68. See, also, *Parham v. J. R.*, 442 U.S. 584, 99 S. Ct. 2493, 61 L. Ed. 2d 101 (1979).

presumption that it is in Xavier's best interests to reunite with Katianne. The State admits Katianne is an adequate parent to her other two children. It has failed to show any reason why Katianne would not be an adequate parent to Xavier as well.

Xavier's special medical needs, which were the sole basis of his adjudication, are no longer present. The record shows that Katianne completed a parenting course and has improved in her parenting skills. She is employed. She has continued her medication and has stayed sober. She has diminished her contact with Xavier's father, who apparently had a negative influence on her life. She has attempted to maintain a bond with Xavier, attending most of her scheduled visitations.

Skulsky's parenting evaluation determined that Katianne was a capable parent so long as ongoing therapy addressed some of her mental health issues. Katianne is attending ongoing therapy and making progress in her therapy goals. There is no evidence that Katianne could not or would not provide for Xavier's basic needs. There is no evidence that Xavier would be subjected to abuse or neglect.

The fact that Katianne is deficient in her time management, budgeting, organization, and implementation of the "timeout" technique does not make her an unfit parent. "'[T]he law does not require perfection of a parent.'"[20] Rather,

> so long as a parent adequately cares for his or her children (*i. e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children.[21]

We are most troubled by the Department's argument that Katianne can handle two, but not three children, inviting the arbitrary removal of one. Nor does the fact that the State considers certain prospective adoptive parents "better" overcome the constitutionally required presumption that reuniting with Katianne is best. "'The court has never deprived a parent of the

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[20] *In re Interest of Aaron D.*, 269 Neb. 249, 265, 691 N.W.2d 164, 176 (2005).

[21] *Troxel v. Granville, supra* note 5, 530 U.S. at 68-69.

custody of a child merely because on financial or other grounds a stranger might better provide.'"[22]

Much concern has been expressed over Xavier's need for permanency and his extended stay in foster care. The record suggests that Xavier can find permanency with his natural mother, to whom he should have been returned as soon as it was safe to do so. There is little question that the alleged deficiencies in Katianne's parenting would not have justified Xavier's removal from the family home had they been the basis upon which the Department had sought adjudication in the first place. They should not have served to keep him out of the home once the reasons for his removal had been resolved; neither should a child be held hostage to compel a parent's compliance with a case plan when reunification with the parent will no longer endanger the child.

Because termination of Katianne's parental rights was not proved to be in Xavier's best interests, her parental rights could not be terminated under either § 43-292(6) or (7). Therefore, we need not consider the State's cross-appeal.

CONCLUSION

Termination of parental rights is permissible only in the absence of any reasonable alternative and as the last resort to dispose of an action brought pursuant to the Nebraska Juvenile Code.[23] The State has failed to prove that termination is in Xavier's best interests because it has failed to prove that Katianne is unfit. We, therefore, reverse the judgment of the Court of Appeals, and remand the cause to that court with directions to reverse the judgment of the juvenile court.

REVERSED AND REMANDED WITH DIRECTIONS.

CONNOLLY, J., participating on briefs.

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[22] *In re Guardianship of D.J., supra* note 9, 268 Neb. at 247, 682 N.W.2d at 245.

[23] See, *id.*; *In re Interest of Kantril P. & Chenelle P.*, 257 Neb. 450, 598 N.W.2d 729 (1999); *In re Interest of Crystal C.*, 12 Neb. App. 458, 676 N.W.2d 378 (2004).

RICHARD A. WADKINS, APPELLANT, V. FERNANDO LECUONA III, COMMISSIONER OF LABOR, STATE OF NEBRASKA, APPELLEE.

740 N.W.2d 34

Filed October 19, 2007. No. S-06-1008.

1. **Administrative Law: Judgments: Appeal and Error.** A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record. When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
2. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
3. **Employment Security.** Based upon the plain and ordinary meaning of the first definition contained in Neb. Rev. Stat. § 48-602(27) (Reissue 2004), two elements must be satisfied to demonstrate unemployment: First, the individual must not perform any services for the relevant time period; and second, no wages may be payable with respect to that time period.
4. **Employment Security: Wages: Time.** In determining whether wages are "payable with respect" to the week in which they are paid, within the meaning of Neb. Rev. Stat. § 48-602(27) (Reissue 2004), the test is not in what week the remuneration is received but in what week it is earned or to which it may reasonably be considered to apply.
5. **Wages: Time.** Generally speaking, wages are tied to the week of work and not to the week in which they are paid.
6. **Employment Security: Wages.** Vacation pay is generally regarded, not as a gratuity or gift, but as additional wages for services performed.
7. **Employment Security: Words and Phrases.** A vacation is a respite from active duty, during which activity or work is suspended, purposed for rest, relaxation, and personal pursuits.
8. **Employment Security.** The Employment Security Law, Neb. Rev. Stat. §§ 48-601 to 48-671 (Reissue 2004), is to be liberally construed to accomplish its beneficent purpose of paying benefits to involuntarily unemployed workers.
9. **Employment Security: Wages.** "Vacation pay" does not include circumstances in which an individual is being paid for time he actually worked.
10. **Wages: Time.** Deferred compensation is generally understood to be payable with respect to the time it is earned, not the time it is paid.
11. **Termination of Employment: Words and Phrases.** The term "layoff" can denote either a permanent or a temporary termination of employment, although it often implies a temporary cessation of employment with the possibility of recall.
12. ____: ____. A layoff involves termination of employment at the employer's will.
13. **Employment Security: Words and Phrases.** A layoff, despite the possibility of recall, is involuntary "unemployment" within the meaning of unemployment insurance benefit laws.

Appeal from the District Court for Otoe County: DANIEL BRYAN, JR., Judge. Reversed and remanded with directions.

Richard H. Hoch, of Hoch, Funke & Partsch, for appellant.

John H. Albin, Thomas A. Ukinski, and W. Russell Barger, of Nebraska Workforce Development, Department of Labor, Office of Legal Counsel and Administrative Affairs, for appellee.

HEAVICAN, C.J., WRIGHT, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

GERRARD, J.

Richard A. Wadkins appeals from an order of the district court, affirming a determination of the Nebraska Appeal Tribunal that Wadkins had received unemployment insurance benefits to which he was not entitled. Wadkins had been laid off and was not performing services for his employer while he was receiving unemployment insurance benefits. But Wadkins was receiving money from his employer for compensatory time (comp time) Wadkins had accrued and for commissions on sales Wadkins had made before he had been laid off. The question presented in this appeal is whether the payments Wadkins received from his employer disqualified him from receiving unemployment insurance benefits under Nebraska's Employment Security Law.[1] We conclude they did not, and reverse the decision of the district court affirming the appeal tribunal's decision ordering Wadkins to repay the benefits he had received.

BACKGROUND

Wadkins was employed by Americana Shopping Carts, Inc. (Americana), a company that, by its own description, "maintains a nationwide fleet of mobile maintenance units that provide cleaning and repair of shopping carts" and other retail sales equipment. Wadkins was a maintenance supervisor, whose duties involved traveling to Americana's customers to repair their shopping carts. While Wadkins was visiting those customers, he also sold them carts and cart-related products such as

[1] Neb. Rev. Stat. §§ 48-601 to 48-671 (Reissue 2004).

spare parts and seatbelts. Wadkins earned a 5-percent commission on such sales.

The "Job Description and Requirements" for Wadkins' position explained that his salary was based on a 260-day work year and that comp time was awarded on a one-to-one basis for each day an employee worked over 260 days. Wadkins' regular pay, not including commissions, was $480.77 per week.

Wadkins was laid off because of a "temporary work slow down," effective December 11, 2004. Wadkins filed a claim for unemployment insurance benefits. During the time period at issue, between January 22 and March 5, 2005, Wadkins was paid unemployment insurance benefits of $288 per week. Wadkins was also being paid by Americana during that period. Americana paid Wadkins $480.77 per week except for the weeks of January 22, during which Wadkins was paid $508.55; January 29, during which Wadkins was paid $537.21; and February 12, during which Wadkins was paid $288.48. Wadkins was apparently recalled to work for Americana on March 8.

Wadkins testified that the money he was paid by Americana after he was laid off was money earned before he was laid off, by working Saturdays and Sundays during the prior year. Wadkins described that time as comp time, and explained that when he was off work, the company paid him for his comp time on a weekly basis. Wadkins asserted that he had not worked or earned wages while he was receiving unemployment insurance benefits. Wadkins also explained that commissions on sales orders were not paid immediately, but were paid when the sales orders were shipped. Wadkins said that Americana's payments for the weeks ending January 22 and January 29, 2005, included some of his sales commissions.

Following a wage audit, the Department of Labor (the Department) concluded that Wadkins' payments from Americana were unreported earnings and that Wadkins had been overpaid $2,016 in unemployment insurance benefits. Wadkins appealed, and the Nebraska Appeal Tribunal affirmed the judgment. The appeal tribunal accepted Wadkins' explanation of the payments, but determined that "[t]he amounts were at the time [Wadkins] received them 'determinable' and[/]or vacation pay,"

and therefore disqualifying compensation that exceeded his weekly benefit amount.[2]

Wadkins appealed the appeal tribunal's determination, pursuant to the Administrative Procedure Act.[3] The district court concluded that comp time payments were considered "earnings" when they became "payable" and found that Wadkins' comp time only became "payable" on a day-to-day basis during his layoff. The district court affirmed the decision of the appeal tribunal.

ASSIGNMENT OF ERROR

Wadkins assigns that the district court erred in finding that the compensation he received from Americana disqualified him from receiving unemployment insurance benefits.

STANDARD OF REVIEW

[1] A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record. When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.[4]

[2] Statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.[5]

ANALYSIS

The issue in this case is whether Wadkins was, despite receiving compensation from Americana after being laid off,

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[2] See § 48-602(27).

[3] Neb. Rev. Stat. §§ 84-901 to 84-920 (Reissue 1999 & Cum. Supp. 2006). See § 48-640.

[4] *Chase 3000, Inc. v. Nebraska Pub. Serv. Comm.*, 273 Neb. 133, 728 N.W.2d 560 (2007).

[5] *Ottaco Acceptance, Inc. v. Larkin*, 273 Neb. 765, 733 N.W.2d 539 (2007).

"unemployed" within the meaning of the Employment Security Law. The Employment Security Law defines "unemployed" as

> an individual during any week in which the individual performs no service and with respect to which no wages are payable to the individual or any week of less than full-time work if the wages payable with respect to such week are less than the individual's weekly benefit amount, but shall not include any individual on a leave of absence or on paid vacation leave.[6]

"Paid vacation leave" is a period of time while employed or following separation from employment in which the individual renders no services to the employer but is entitled to receive vacation pay equal to or exceeding his or her base weekly wage.[7] And where a collective bargaining agreement does not allocate vacation pay to a specified period of time during a "period of temporary layoff or plant shutdown," the payment by the employer "will be deemed to be wages . . . in the week or weeks the vacation is actually taken."[8]

[3] We have explained that based upon the plain and ordinary meaning of the first definition contained in § 48-602(27), two elements must be satisfied to demonstrate unemployment: First, the individual must not perform any services for the relevant time period; and second, no wages may be payable with respect to that time period.[9] There is no dispute in this case that Wadkins performed no services for Americana after he was laid off. Our inquiry here focuses on whether Wadkins received wages payable with respect to the time after the layoff and whether Wadkins was on "paid vacation leave" within the meaning of the Employment Security Law.

[4,5] On appeal, the parties do not dispute the underlying facts. Given those facts, as a matter of law, Wadkins' comp time payments were not "payable with respect" to the weeks in which

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[6] § 48-602(27).

[7] § 48-602(18).

[8] See § 48-602(27).

[9] *Lecuona v. McCord*, 270 Neb. 213, 699 N.W.2d 403 (2005); *Vlasic Foods International v. Lecuona*, 260 Neb. 397, 618 N.W.2d 403 (2000); *Board of Regents v. Pinzon*, 254 Neb. 145, 575 N.W.2d 365 (1998).

the payments were made. In *Board of Regents v. Pinzon*,[10] we explained that in making such determinations, the test is not in what week the remuneration is received but in what week it is earned or to which it may reasonably be considered to apply. Thus, in *Pinzon*, we concluded that a university professor whose contract had not been renewed was entitled to unemployment compensation at the conclusion of the 9-month academic term, even though his salary for the year was paid on a 12-month basis.[11] Generally speaking, wages are tied to the week of work and not to the week in which they are paid.[12] In *Pinzon*, the claimant's remaining 3 months of salary were, essentially, deferred wages "payable" when they were earned during the academic year, not when they were received.[13]

The same principles apply here. It is not disputed that Wadkins actually worked the days for which, after the layoff, he was paid. The payments he received are properly allocated to the weeks in which they were earned, before the layoff, not when the payments were received.

The Department contends that *Pinzon* is distinguishable in a number of ways. Most pertinently, the Department argues that Wadkins' comp time payments are the equivalent of "paid vacation leave" within the meaning of the specific statutory exclusion of paid vacation leave from "unemployment."[14]

What little authority there is on the subject of comp time is divided. In *Transportation Dept. v. LIRC*,[15] the Court of Appeals of Wisconsin found that compensatory time off was "similar to a paid vacation" and was included within the definition of the term "wages." That disqualified the claimants from receiving unemployment insurance benefits, according to the court,

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[10] *Pinzon, supra* note 9.

[11] See *id.*

[12] *Id.*

[13] See *id.*

[14] § 48-602(27).

[15] *Transportation Dept. v. LIRC*, 122 Wis. 2d 358, 360, 361 N.W.2d 722, 723-24 (Wis. App. 1984).

because if the claimants received "wages" while they were not working, they were not unemployed under Wisconsin law.[16]

The Supreme Court of New York, Appellate Division, reached a contrary conclusion in *Matter of Giandomenico*,[17] in which unemployment insurance benefits had been extended to a driver of an ice cream truck who was laid off based on "traded time." Under the employment agreement, a driver would not be paid overtime when it was earned. Instead, the employer would credit the overtime hours to the driver. When business was slack, the least senior drivers would be laid off, but compensated from the fund created by the banked overtime.[18]

The New York appellate court concluded that the driver was unemployed under New York law and entitled to benefits. The court explained:

> The record conclusively demonstrates that the claimant was laid off . . . . His employer concededly had no work for him for a period of seven weeks. Of critical importance is the fact that the money he received from the employer was not wages or remuneration or vacation pay but was his own previously earned money which had been held by the employer for an extended period of time. In short, he had no employment for seven weeks and no remuneration from his employer, and the extension of certain fringe benefits did not change his situation.[19]

We find the New York court's understanding of comp time to be more persuasive, and more consistent with principles of Nebraska law. The Wisconsin court's analysis was focused on whether the claimant's comp time earnings were "wages" under Wisconsin law, and not the time period to which the wages should be applied. As previously explained, the issue under Nebraska law is not whether the payments Wadkins received were "wages"—they were—but with respect to what week those payments are considered "payable." And under Nebraska law,

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[16] See *id.*

[17] *Matter of Giandomenico*, 77 A.D.2d 294, 295, 433 N.Y.S.2d 267, 268 (1980).

[18] See *id.*

[19] *Id.* at 295-96, 433 N.Y.S.2d at 268.

for the same reasons articulated by the New York court, the payments Wadkins received were for services rendered before he was laid off and were earned and "payable" when Wadkins was working.

[6,7] We specifically reject the Department's assertion that comp time, at least under the facts of this case, is "vacation pay" under the Employment Security Law.[20] Vacation pay is generally regarded, not as a gratuity or gift, but as *additional* wages for services performed.[21] It is not in the nature of compensation for the calendar days it covers—it is more like a contracted-for bonus for a whole year's work.[22] By contrast, in this case, Wadkins was being separately and specifically paid for days he had already worked. A "vacation" is also understood to be a respite from active duty, during which activity or work is suspended, purposed for rest, relaxation, and personal pursuits.[23] While Wadkins was not working after he was laid off, the days for which he was being paid—the Saturdays and Sundays he *had* worked—were not "vacation" days within any reasonable understanding of the term.

[8-10] We have held that the Employment Security Law is to be liberally construed to accomplish its beneficent purpose of paying benefits to involuntarily unemployed workers.[24] And the legislative history of the vacation pay exclusion indicates that the Legislature was concerned with circumstances in which unemployment insurance benefits were being awarded to employees who were on vacation and receiving vacation pay benefits in the regular course of business and who were

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[20] See § 48-602(18).

[21] See, *In re Wil-Low Cafeterias*, 111 F.2d 429 (2d Cir. 1940); *Suastez v. Plastic Dress-Up Co.*, 31 Cal. 3d 774, 647 P.2d 122, 183 Cal. Rptr. 846 (1982).

[22] *Mathewson v. Westinghouse Elec. Corp.*, 394 Pa. 518, 147 A.2d 409 (1959).

[23] See, *City of Dallas v. Massingill*, 737 S.W.2d 334 (Tex. App. 1987); *Mtr. of Walker (Reader's Digest)*, 28 A.D.2d 256, 284 N.Y.S.2d 584 (1967).

[24] See *Dillard Dept. Stores v. Polinsky*, 247 Neb. 821, 530 N.W.2d 637 (1995).

expected to return to work at the end of their vacation leaves.[25] In that context, we are not inclined to construe "vacation pay" to include circumstances in which an individual is admittedly being paid for time he actually worked. Instead, like *Pinzon*, the payments in this case are more akin to deferred compensation, generally understood to be payable with respect to the time it is earned, not the time it is paid.[26]

The Department also suggests that *Pinzon* is distinguishable because that case has been limited to circumstances in which the claimant's employment relationship has been severed.[27] Here, the Department asserts that Wadkins "was still employed by Americana, and still considered to be an employee, although there had been a 'temporary work slow down.'"[28]

[11-13] We recognize that some courts have distinguished, for various purposes, between a "layoff" and a "discharge" as the terms are commonly understood. The term "layoff" can, depending on the circumstances, denote either a permanent or a temporary termination of employment, although it often implies a temporary cessation of employment with the possibility of recall.[29] But there is little question that a "layoff" involves termination of employment at the employer's will.[30] It differs from a complete termination only in degree.[31] While Wadkins' layoff was temporary, and he was recalled to Americana after 3 months, there is no indication in the record that he voluntarily ceased work. In the absence of a specific statutory provision,[32]

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[25] See, e.g., Introducer's Statement of Intent, L.B. 608, Business and Labor Committee, 96th Leg., 1st Sess. (Feb. 1, 1999).

[26] See, *Pinzon, supra* note 9. See, also, *Buse v. Mississippi Emp. Sec. Com'n*, 377 So. 2d 600 (Miss. 1979); *Erie Ins. Gr. v. Unemployment Comp. Bd.*, 654 A.2d 105 (Pa. Commw. 1995).

[27] See *Vlasic Foods International, supra* note 9.

[28] Brief for appellee at 4.

[29] See *McIlravy v. Kerr-McGee Coal Corp.*, 204 F.3d 1031 (10th Cir. 2000).

[30] *Sanders v. Donovan*, 786 F.2d 920 (9th Cir. 1986).

[31] See *State ex rel. Ausburn v. Seattle*, 190 Wash. 222, 67 P.2d 913 (1937).

[32] See, e.g., § 48-628(8) (generally disqualifying employees of educational institutions who have "reasonable assurance" of reemployment in subsequent academic terms); § 48-628(9) (disqualifying professional athletes

the *possibility* of recall to work is not pertinent, so long as no services are performed for, nor wages payable with respect to, the relevant time period.[33] A "layoff," despite the possibility of recall, is considered to be involuntary "unemployment" within the meaning of unemployment insurance benefit laws.[34]

The Department also asserts that under the Social Security Act,[35] the "period" during which wages are paid refers to the financial quarter or calendar year during which the employer should report the wages,[36] and notes that Americana reported Wadkins' comp time wages when they were paid, after Wadkins was laid off. But when wages are reportable for Social Security purposes does not define the period with respect to which they are "payable" within the meaning of Nebraska's Employment Security Law.[37] That, as we have already explained, is established by when the wages were earned, not when they were actually paid or reported by the employer for tax purposes.[38]

Finally, we note that our decision is based solely on the appropriate attribution of Wadkins' comp time payments, and we do not consider the money Wadkins received for sales commissions. Commissions are included in the definition of "wages,"[39] but regardless of when the commissions were "payable," the amount did not exceed one-half of Wadkins' weekly benefit amount, and would not have affected Wadkins' eligibility for his full weekly benefit amount.[40] Therefore, our conclusion with respect to Wadkins' comp time is dispositive of this appeal, and we need not consider his commissions.

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during off-season who have "reasonable assurance" of reemployment in following season).

[33] See § 48-602(27).

[34] See *GMC v Erves*, 399 Mich. 241, 249 N.W.2d 41 (1976). Cf. *Goodyear Tire & Rubber Co. v. Employment Security Board of Review*, 205 Kan. 279, 469 P.2d 263 (1970).

[35] 42 U.S.C. § 301 et seq. (2000 & Supp. IV 2004).

[36] § 405(c)(1)(D).

[37] See § 48-602(27).

[38] See *Pinzon, supra* note 9.

[39] See § 48-602(29).

[40] See § 48-625(1). See, also, *McCord, supra* note 9.

CONCLUSION

The payments Wadkins received after being laid off were wages for comp time Wadkins had earned by working extra days before he was laid off, and were "payable" within the meaning of the Employment Security Law with respect to the weeks they were earned, not the weeks during which they were paid. The payments for Wadkins' comp time were deferred compensation for time Wadkins had actually worked and were not "vacation pay" within the meaning of the Employment Security Law.

The district court erred in concluding that Wadkins had been overpaid. The judgment of the district court is reversed, and the cause is remanded to the district court with directions to reverse the determination of the appeals tribunal affirming the decision of the Department.

REVERSED AND REMANDED WITH DIRECTIONS.

Connolly, J., participating on briefs.

JOHN DAVIS, APPELLEE AND CROSS-APPELLANT, V. CRETE CARRIER CORPORATION AND TRANSPORTATION CLAIMS, INC., ITS WORKERS' COMPENSATION INSURER, APPELLANTS AND CROSS-APPELLEES.

740 N.W.2d 598

Filed October 26, 2007. No. S-05-1328.

1. **Workers' Compensation: Appeal and Error.** Pursuant to Neb. Rev. Stat. § 48-185 (Reissue 2004), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is no sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.
2. ____: ____. Upon appellate review, the findings of fact made by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong.
3. ____: ____. An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law.
4. ____: ____. In reviewing decisions of the Workers' Compensation Court, an appellate court will consider only those errors specifically assigned to the review panel and then reassigned on appeal.
5. **Workers' Compensation: Employer and Employee.** As a general rule, an employer may not unilaterally terminate a workers' compensation award of

indefinite temporary total disability benefits absent a modification of the award of benefits.

Petition for further review from the Court of Appeals, IRWIN, MOORE, and CASSEL, Judges, on appeal thereto from the Workers' Compensation Court. Judgment of Court of Appeals affirmed.

Jill Gradwohl Schroeder, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellant.

Raymond P. Atwood, Jr., of Atwood, Holsten & Brown, P.C., L.L.O., for appellees.

WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MCCORMACK, J.

NATURE OF CASE

John Davis filed a motion in the Nebraska Workers' Compensation Court against Crete Carrier Corporation and its workers' compensation insurer, Transportation Claims, Inc. (collectively Crete Carrier). Davis sought to assess waiting-time penalties, interest, and attorney fees pursuant to Neb. Rev. Stat. § 48-125 (Reissue 2004). Davis alleged that Crete Carrier unilaterally stopped paying temporary total disability benefits awarded under a February 2, 1993, award on rehearing. Davis asserted entitlement to ongoing temporary total disability benefits from the time his temporary total disability benefits were stopped until the hearing on the motion, or at least when he filed the motion. The single judge denied Davis' motion. Davis appealed and Crete Carrier cross-appealed to the compensation court three-judge review panel, which reversed. The review panel held, citing *ITT Hartford v. Rodriguez*,[1] *Starks v. Cornhusker Packing Co.*,[2] and *Hagelstein v. Swift-Eckrich*,[3] that there must be a hearing to terminate benefits and that benefits may not be summarily terminated, as was done in this case.

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[1] *ITT Hartford v. Rodriguez*, 249 Neb. 445, 543 N.W.2d 740 (1996).

[2] *Starks v. Cornhusker Packing Co.*, 254 Neb. 30, 573 N.W.2d 757 (1998).

[3] *Hagelstein v. Swift-Eckrich*, 261 Neb. 305, 622 N.W.2d 663 (2001).

Crete Carrier appealed to the Nebraska Court of Appeals, which affirmed in part, and in part reversed.[4] The Court of Appeals held that the November 1993 order, based upon the stipulation of the parties, modified the duration of the prior award and that, therefore, no specific application was necessary because the award was modified by agreement of the parties as set forth in Neb. Rev. Stat. § 48-141 (Reissue 2004). Davis now seeks further review from this court.

BACKGROUND

Davis sustained a compensable back injury on March 26, 1989, while employed by Crete Carrier Corporation. On February 2, 1993, after other proceedings not relevant to the present appeal, the review panel entered an award on rehearing. With regard to disability, the review panel determined in paragraph II of the award as follows:

> As a result of said accident and injury [Davis] incurred medical and hospital expense [sic] and was temporarily totally disabled from and including March 31, 1989 to and including April 5, 1991, a period of 105-1/7 weeks, and thereafter sustained a 35 percent permanent partial disability to the body as a whole from and including April 6, 1991 to and including June 14, 1991, a period of 10 weeks and thereafter was again temporarily totally disabled from and including June 15, 1991 to the date of this rehearing on September 28, 1992, is still temporarily totally disabled and will remain temporarily totally disabled for an indefinite future period of time.

In paragraph III of the award, the review panel stated in pertinent part, "When [Davis'] total disability ceases, he shall be entitled to the statutory amounts of compensation for any residual permanent partial disability due to this accident and injury."

In paragraph IX of the award, the review panel stated, "[Davis] is still entitled to vocational rehabilitation services at such time as he is able to participate in said services. If the parties are unable to eventually agree on the nature and/or extent of said

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[4] *Davis v. Crete Carrier Corp.*, 15 Neb. App. 241, 725 N.W.2d 562 (2006).

vocational rehabilitation services, either party may request a hearing on this issue." And in paragraph XII of the award, the review panel stated, "When [Davis'] total disability ceases if thereafter the parties cannot agree on the extent of [Davis'] disability, if any, then a further hearing may be had herein on the application of either party."

On November 23, 1993, one of Davis' treating physicians opined that Davis had reached maximum medical improvement and had a 25-percent medical impairment rating of the body as a whole. On approximately the same date, the single judge entered an order stating that "[p]ursuant to the stipulation of [Davis] and [Crete Carrier], received November 18, 1993, [Crete Carrier] is hereby ordered to pay to [Davis] temporary disability compensation while [Davis] is undergoing vocational rehabilitation and maintaining satisfactory progress in the plan of which the stipulation is a part." The parties' actual stipulation is not contained in the record before this court.

The record shows that Davis participated in a training program at a motorcycle mechanics' institute in Phoenix, Arizona, from December 13, 1993, through October 28, 1994. On October 29, Crete Carrier began paying Davis permanent partial disability benefits. On December 29, 1994, after paying 300 weeks of benefits, Crete Carrier stopped all disability payments to Davis. This cessation of benefits was done without a hearing before the compensation court. Neither Crete Carrier nor Davis filed a petition to modify the February 2, 1993, award on rehearing.

On October 2, 2003, 9 years after payments ceased, Davis filed a motion seeking an order to assess waiting-time penalties, interest, and attorney fees pursuant to § 48-125. Davis alleged that on February 2, 1993, he received a running award of temporary total disability benefits, and that in 1994, Crete Carrier unilaterally stopped paying such benefits to him. Davis alleged that Crete Carrier was in arrears and liable to him for such delinquent benefits from the date of termination of payment to the date of the hearing on his motion. Davis further alleged that there was no reasonable controversy regarding Crete Carrier's liability to him and that Crete Carrier was, therefore, also liable to him for waiting-time penalties, interest, and attorney fees

for all delinquent payments due. Davis asked the single judge to sustain his motion, determine the delinquencies of Crete Carrier, and order Crete Carrier to pay waiting-time penalties, interest, and attorney fees.

On May 5, 2005, the single judge entered an order overruling Davis' motion. In its order, the single judge stated that it is significant that the February 1993 award on rehearing provided that Davis was temporarily totally disabled "'to the date of this rehearing on September 28, 1992, is still temporarily totally disabled and will remain temporarily totally disabled for an indefinite future period of time.'" The single judge found that when Davis reached maximum medical improvement as established by a treating physician on November 23, 1993, Davis was no longer temporarily totally disabled. At that point, he became permanently disabled, and the extent and nature of that permanent disability would be an issue to be decided by the compensation court, if necessary. The single judge found that the November 18 order entered pursuant to a stipulation by the parties did nothing to change the analysis set forth above except for continuing temporary disability payments until Davis finished the agreed-upon and court-ordered vocational retraining.

Davis argued to the single judge that under *Sheldon-Zimbelman v. Bryan Memorial Hosp.*[5] and *Starks*,[6] it is required that Crete Carrier file an application to modify the award on rehearing before terminating benefits. The single judge found, however, that those cases dealt with awards of permanent disability, not temporary disability, and did not apply. The single judge stated:

> Such a result would leave this Court subjected to hundreds, if not thousands, of potential modification actions which would need to be filed before various plaintiffs attained maximum medical improvement in order to change the benefit amounts on the date of maximum medical improvement. Such an interpretation is simply not a feasible interpretation of Sheldon-[Z]imbelman and Starks,

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[5] *Sheldon-Zimbelman v. Bryan Memorial Hosp.*, 258 Neb. 568, 604 N.W.2d 396 (2000).

[6] *Starks v. Cornhusker Packing Co., supra* note 2.

> *supra*[,] and has never been applied by this Court for running awards of temporary total disability.

The single judge concluded that when a running award of temporary total disability is entered, a hearing is not necessary unless the parties disagree about the extent and nature of the permanent partial disability.

The single judge also found that under Neb. Rev. Stat. § 48-121(2) (Reissue 2004), unless an injured employee is permanently and totally disabled, the employee's entitlement to benefits for partial disability is limited to a total of 300 weeks, less any weeks of total disability indemnification received. The single judge found that Crete Carrier fulfilled its statutory obligation under the language of the award on rehearing. The single judge stated that when Davis attained maximum medical improvement on November 23, 1993, he was not permanently and totally disabled. The judge noted that Davis was able to successfully complete his vocational rehabilitation program and that he is not entitled to any additional benefits. As to Davis' claim for waiting-time penalties, the single judge found that a reasonable controversy existed as to Crete Carrier's obligation to pay additional indemnification benefits to Davis after 300 weeks of payments were made.

Davis filed an application for review with the three-judge review panel of the compensation court. The review panel reversed the single judge's decision and remanded the matter. The review panel found that Nebraska case law requires a hearing to terminate benefits and that benefits may not be summarily terminated, as was done in this case. The review panel further found that *Sheldon-Zimbelman* and *Starks* set forth the correct statement of the law requiring a modification application to terminate payment of benefits under an award.

Crete Carrier appealed the review panel's decision to the Court of Appeals, which reversed. Without directly addressing the applicability of *Sheldon-Zimbelman* and *Starks*, the Court of Appeals held that the November 1993 order was an agreed-upon modification which satisfied the requirements of § 48-141. After noting that the meaning of the November order was a matter of law, the Court of Appeals concluded that the language in the order specifying temporary total disability compensation

would be paid "'while . . . undergoing the vocational rehabilitation plan'" changed the duration of Davis' temporary total disability.[7] Davis now seeks further review from this court.

ASSIGNMENTS OF ERROR

Davis assigns that the Court of Appeals erred in (1) finding that Crete Carrier properly preserved the issue of whether the single judge's November 1993 order modified the review panel's February 1993 award on rehearing and failing to find that this issue was waived and res judicata; (2) holding that the stipulation of the parties and the November order constituted a § 48-141 judicially approved agreement that modified the duration of Davis' running temporary total disability under the February award on rehearing and that specific § 48-141 application was not required to terminate Davis' temporary total disability benefits; (3) reversing the review panel's remand to the single judge to determine and enforce the benefits due under the February award; (4) failing to award Davis waiting-time penalties, interest, and attorney fees; and (5) failing to award Davis attorney fees in all lower levels of this proceeding.

STANDARD OF REVIEW

[1] Pursuant to Neb. Rev. Stat. § 48-185 (Reissue 2004), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is no sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.[8]

[2,3] Upon appellate review, the findings of fact made by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong.[9] An

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[7] *Davis v. Crete Carrier Corp., supra* note 4, 15 Neb. App. at 255, 725 N.W.2d at 574 (emphasis omitted).

[8] *Hagelstein v. Swift-Eckrich, supra* note 3.

[9] *Id.*

appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law.[10]

ANALYSIS

Preservation of Issue

Davis first contends that the Court of Appeals erred in finding that Crete Carrier's assignments of error were sufficiently definite and certain to preserve for appellate review the question of whether the November 1993 order and the vocational rehabilitation stipulation modified the February 1993 award on rehearing. Davis argues that on September 30, 2005, the review panel held that the stipulation of the parties and the November 1993 order did not act "'as an "agreement of the parties" to terminate benefits for a running award pursuant to Neb. Rev. Stat. §48-141.'"[11] Davis argues that Crete Carrier did not assign this finding as an error on appeal to the Court of Appeals as required by Neb. Ct. R. of Prac. 9D(1)(e) (rev. 2006) and Neb. Rev. Stat. § 25-1919 (Reissue 1995).

[4] The general rule is that an appellate court will consider only those errors specifically assigned in a lower court and again assigned as error on appeal to the appellate court.[12] In *Dietz v. Yellow Freight Sys.*,[13] we stated that this rule is also applicable in workers' compensation cases. Thus, in reviewing decisions of the compensation court, an appellate court will consider only those errors specifically assigned to the review panel and then reassigned on appeal.[14]

On appeal to the review panel, Davis assigned, consolidated and restated, that the single judge erred in failing to enforce the February 1993 award on rehearing and in failing to order Crete Carrier to pay continuing disability benefits and the requisite penalties under § 48-125. In reversing the single judge's decision, the review panel found that the stipulation between

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[10] *Sheldon-Zimbelman v. Bryan Memorial Hosp., supra* note 5.

[11] Supplemental brief on petition for further review for appellee at 17.

[12] See *Dietz v. Yellow Freight Sys.*, 269 Neb. 990, 697 N.W.2d 693 (2005).

[13] *Id.*

[14] See *id.*

the parties and the compensation court's November 1993 order did not act as an agreement of the parties to terminate benefits. The review panel found instead that the stipulation and order allowed Davis to receive indemnity benefits while undergoing vocational rehabilitation. The review panel further found, based on Nebraska case law,[15] that a hearing must be held to terminate benefits and that benefits may not be summarily terminated. The review panel then found that the single judge misstated the law in Nebraska to be that an application to modify is not required when terminating temporary total disability benefits. The review panel concluded that regardless of whether a party is terminating temporary total disability benefits or permanent total disability benefits, a modification application to terminate benefits under such an award is needed.

To the Court of Appeals, Crete Carrier broadly assigned as error the review panel's ruling that Crete Carrier had not properly paid benefits to Davis based on the February 1993 award on rehearing and the November order. As noted by the Court of Appeals, encompassed within this broad assignment of error was the question of whether the review panel incorrectly found that an application to modify the February award on rehearing was necessary to terminate Davis' temporary total disability benefits. Accordingly, we conclude that this assignment of error is without merit.

Modification Requirement

In Davis' second and third assignments of error, he contends that the Court of Appeals erred in determining that the stipulation and November 1993 order constituted a § 48-141 judicially approved agreement which modified the February 1993 award on rehearing and Davis' temporary total disability award. Davis further contends that the Court of Appeals erred in concluding that a § 48-141 application is not required to terminate Davis' benefits. Davis claims error in the Court of Appeals' reversing the review panel's remand of the matter to the single judge to determine and enforce the benefits due under the February

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[15] See, *Hagelstein v. Swift-Eckrich, supra* note 3; *Starks v. Cornhusker Packing Co., supra* note 2; *ITT Hartford v. Rodriguez, supra* note 1.

award on rehearing. The broad question presented by these assignments of error is whether Crete Carrier complied with the proper procedures when terminating Davis' temporary total disability benefits.

[5] Our case law has established that as a general rule, an employer may not unilaterally terminate a workers' compensation award of indefinite temporary total disability benefits absent a modification of the award of benefits. For example, in *Starks*,[16] we held that an employer was required to pay an employee permanent disability benefits until an application to modify the original award was filed. In *Starks*, the single judge determined that the employee was permanently and totally disabled. Approximately 2 years later, the employer unilaterally terminated the employee's benefits. The employee filed a motion with the compensation court requesting an order requiring the employer to resume making total disability payments. The employer then filed an application for modification, claiming the employee's disability ceased the day after payments were terminated.

We stated on appeal, "[A] workers' compensation award is in full force and effect, as originally entered, until the award is modified pursuant to the procedure set forth in § 48-141. . . . [E]mployers are prohibited from unilaterally modifying workers' compensation awards."[17] We concluded that the employer in *Starks* had unilaterally terminated the employee's benefit payments. We further concluded that the employer owed the employee total and permanent disability payments from the time it unilaterally terminated benefit payments until the date the employer filed an application for modification.

Similarly, we held in *Hagelstein*[18] that an employer had an obligation to pay an injured employee the originally ordered workers' compensation benefits until an application to modify the award of benefits was filed. In *Hagelstein*, the single judge found that the employee was totally disabled and was entitled to

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[16] *Starks v. Cornhusker Packing Co., supra* note 2.

[17] *Id.* at 38, 573 N.W.2d at 763-64 (citation omitted).

[18] *Hagelstein v. Swift-Eckrich, supra* note 3.

benefits for an indefinite period. Thereafter, the employee filed a petition with the compensation court alleging that his employer had ceased paying total disability and had begun paying permanent partial disability on June 19, 1995. The single judge found that the employee had reached maximum medical improvement on April 24 and ordered the employer to pay reduced benefits as of that date. The review panel reversed the portion of the trial court's order requiring payment of permanent partial disability beginning in April and ordered payments to commence on March 6, 1996, the day on which the employee's petition was filed.

On appeal, we treated the employer as the applicant for modification and the date the employer filed its answer as the "application" date. We explained that it was in its answer that the employer set out its claim requesting a modification of the award of temporary total disability benefits. And we reiterated our statements from *Starks*,[19] that an employer is prohibited from unilaterally modifying a workers' compensation award and that an employer's unilateral cessation of benefits is not the basis for the modification of an award of benefits.

We believe the present case presents a factually distinct case from *Starks* and *Hagelstein*. Paragraph III of the February 1993 award on rehearing provided in pertinent part, "When [Davis'] total disability ceases, he shall be entitled to the statutory amounts of compensation for any residual permanent partial disability due to this accident and injury." Paragraph XII further provided, "When [Davis'] total disability ceases if thereafter the parties cannot agree on the extent of [Davis'] disability, if any, then a further hearing may be had herein on the application of either party."

The terms of the February 1993 award on rehearing are clear. Davis, like the employees in *Starks* and *Hagelstein*, was awarded temporary total disability benefits for an indefinite period of time. Davis' award on rehearing further provided, however, that when Davis' total disability ceased, he was entitled to any statutory amounts of permanent partial disability benefits due. Under the terms of this award, if Davis and Crete

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[19] *Starks v. Cornhusker Packing Co.,* *supra* note 2.

Carrier could not agree on the extent of Davis' permanent partial disability benefits, either party could request a hearing on the matter. Thereafter, as previously noted in this opinion, an order file stamped November 18, 1993, was entered directing Crete Carrier to pay Davis temporary total disability benefits while Davis was undergoing vocational rehabilitation and making satisfactory progress. This order was based upon a stipulation between the parties. On November 23, a treating physician opined that Davis had reached maximum medical improvement. Then, on October 29, 1994, following Davis' completion of his vocational rehabilitation program, Crete Carrier ceased paying Davis temporary total disability payments. At that point, there were only approximately 8$\frac{5}{7}$ weeks left of the 300 weeks of permanent partial disability benefits due to Davis, for which he was paid.

Based upon the facts of this case, we conclude that no application to modify the award was needed to terminate Davis' temporary total disability benefits and to begin payment of his permanent partial disability benefits. Under the terms of the award, had Davis wished to dispute the termination of his temporary total disability benefits, he could have requested a hearing with the compensation court.

Waiting-Time Penalties, Interest, and Attorney Ffes

In Davis' final assignments of error, he contends that the Court of Appeals erred in failing to award him waiting-time penalties, interest, and attorney fees. Section 48-125 authorizes a 50-percent penalty payment of compensation and an attorney fee where there is no reasonable controversy regarding an employee's claim for workers' compensation benefits. Having determined that Crete Carrier properly terminated Davis' temporary total disability benefits, we conclude that the Court of Appeals correctly determined that a reasonable controversy existed with respect to Crete Carrier's obligation to pay additional indemnity benefits.

CONCLUSION

For the reasons discussed above, we affirm the judgment of the Court of Appeals. Although our reasoning differs in part

from that employed by the Court of Appeals, this court will not reverse a judgment which it deems to be correct.[20]

AFFIRMED.

HEAVICAN, C.J., not participating.

[20] See *Mumin v. Dees*, 266 Neb. 201, 663 N.W.2d 125 (2003).

JERRY ALSOBROOK, APPELLANT, V. JIM EARP CHRYSLER-PLYMOUTH, LTD., A NEBRASKA CORPORATION, APPELLEE.

740 N.W.2d 785

Filed October 26, 2007. No. S-06-383.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Statutes: Intent.** In construing a statute, a court must look to the statutory objective to be accomplished, the evils and mischiefs sought to be remedied, and the purpose to be served, and then must place a sensible construction upon the statute to effectuate the object of the legislation, rather than a construction that defeats the purpose of the statute.
4. **Insurance: Contracts: Appeal and Error.** The meaning of an insurance policy is a question of law, in connection with which an appellate court has an obligation to reach its own conclusions independently of the determination made by the lower court.
5. **Insurance: Contracts.** In construing insurance policy provisions, a court must determine from the clear language of the policy whether the insurer in fact insured against the risk involved.
6. **Insurance: Contracts: Intent: Appeal and Error.** In an appellate review of an insurance policy, the court construes the policy as any other contract to give effect to the parties' intentions at the time the writing was made. Where the terms of a contract are clear, they are to be accorded their plain and ordinary meaning.

Appeal from the District Court for Douglas County: GARY B. RANDALL, Judge. Reversed and remanded for further proceedings.

Pamela Epp Olsen, of Cline, Williams, Wright, Johnson & Oldfather, P.C., for appellant.

Joseph F. Gross, Jr., of Timmermier, Gross & Prentiss, for appellee.

HEAVICAN, C.J., CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

GERRARD, J.

Jerry Alsobrook alleges that Jim Earp Chrysler-Plymouth, Ltd. (Earp), negligently repaired his vehicle, which caused Alsobrook to lose control of his car and collide with construction barrels. Alsobrook's insurer paid the damages and now, through Alsobrook, brings a subrogation claim against Earp. While this action was pending, Earp's insurer became insolvent. The primary issue presented in this appeal is whether Alsobrook's claim against Earp is barred by the application of the Nebraska Property and Liability Insurance Guaranty Association Act.[1]

STATEMENT OF FACTS

On July 15, 1999, Alsobrook filed a petition against Earp. In his petition, Alsobrook alleged as follows: In April and May 1998, Earp performed repairs on Alsobrook's vehicle that required Earp to disconnect the retaining nut and threaded connecting post so that the suspension could be dropped down to allow the transmission to be removed from the engine. After making the repairs to Alsobrook's vehicle, Earp did not properly secure the retaining nut to the connecting post and failed to replace the parts necessary to adequately secure the front passenger side wheel to the steering assembly. Alsobrook further alleged that on July 30, 1998, while driving his vehicle, a retaining nut disconnected from the connecting post, which caused him to lose his ability to steer the car. The vehicle ran off the road and collided with construction barrels lining the side of the road.

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[1] Neb. Rev. Stat. § 44-2401 et seq. (Reissue 1998).

Following the accident, Alsobrook filed a claim with his own insurer, Shelter Mutual Insurance Company (Shelter). Shelter paid the claim, less a $1,000 policy deductible. Sometime after Shelter had paid Alsobrook's claim, Alsobrook filed the present lawsuit against Earp seeking $10,190.08 in damages, composed of his $1,000 deductible plus the balance of the damages representing Shelter's subrogation interest.

On November 7, 2001, Earp filed a motion for stay and notice of hearing because its insurer, Reliance Insurance Company (Reliance), had gone into liquidation based on an order entered in the Commonwealth Court of Pennsylvania. On March 22, 2002, Alsobrook's counsel filed a claim with the Nebraska Property and Liability Insurance Guaranty Association (the Association) which, pursuant to the Nebraska Property and Liability Insurance Guaranty Association Act (the Act), provides for the payment of certain claims against insolvent insurance companies. The Association denied Alsobrook's claim, explaining in a letter to Alsobrook that "[i]t appears that the claim is a subrogation claim by Shelter" and that under the Act, the Association is "unable to pay subrogation claims or policy deductibles."[2]

In May 2002, Earp filed a motion for summary judgment which was later converted to a motion for partial summary judgment. The district court granted Earp's motion for partial summary judgment, concluding that the claim filed by Alsobrook's attorney with the Association, and the Association's denial of that claim, constituted "an unconditional general release of all liability of . . . Earp in connection with the Alsobrook claim pursuant to § 44-2406(4)" of the Act. The court further found that, even though Shelter had a subrogation right for what it had paid to Alsobrook, neither Shelter nor Alsobrook could pursue Earp for recovery of any such subrogation interest because of the effect of the Act. Finally, the court determined that Alsobrook does have a cause of action against Earp for the $1,000 deductible not paid by Shelter.

Alsobrook filed a motion for reconsideration, alleging that the Act did not apply to the case. The court denied Alsobrook's motion to reconsider and ordered that "[p]ursuant to [Earp's]

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[2] See § 44-2403(4)(b).

stipulation," judgment was to be entered in favor of Alsobrook for the $1,000 deductible. Alsobrook appealed to the Nebraska Court of Appeals.

The Court of Appeals reversed the district court's decision and remanded the cause because there was "both a pleading and a proof deficiency."[3] The court explained that "the evidence [did] not show, nor [was] it admitted in the pleadings, that Shelter paid Alsobrook any portion of his property damages."[4] The court further noted that a "second problem [was] that Shelter's alleged subrogation and the resulting effect of the Act [were] not pled as an affirmative defense by Earp to Alsobrook's suit."[5]

On remand, Earp filed an amended answer asserting the application of the Act as an affirmative defense and submitted evidence establishing that Shelter had paid Alsobrook's claim, less the $1,000 policy deductible. Earp also offered into evidence the affidavit of Victor Kovar, a claims manager for the Association. Generally, Kovar opined that the Reliance policy covered Alsobrook's claim against Earp but that Shelter's subrogation claim was barred by the Act.

Alsobrook objected, arguing that the affidavit contained legal conclusions as to the proper interpretation of the Act and Reliance's insurance policy. The district court overruled this objection. Earp again filed a motion for partial summary judgment, which was granted. The court explained that because Earp had made an offer to confess judgment in favor of Alsobrook with respect to the deductible amount, judgment was entered for Alsobrook and against Earp in the amount of $1,000. Alsobrook appealed.

ASSIGNMENT OF ERROR

Alsobrook assigns, consolidated, restated, and renumbered, that the district court erred in (1) applying the Act to limit his recovery to $1,000 and (2) receiving into evidence the legal conclusions contained in Kovar's affidavit.

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[3] *Alsobrook v. Jim Earp Chrysler Plymouth*, No. A-02-1065, 2004 WL 726810 at *5 (Neb. App. Apr. 6, 2004) (not designated for permanent publication).

[4] *Id.* at *2

[5] *Id.*

STANDARD OF REVIEW

[1,2] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[6] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.[7]

ANALYSIS

At issue in this case is whether Alsobrook's claim against Earp is barred by the application of the Act. Earp argues that pursuant to the provisions of the Act, Alsobrook—or, more to the point, Shelter—is precluded from bringing a subrogation claim against an insured of an insolvent insurer, such as Earp. Alsobrook contends, however, that the Act does not apply in this case because his claim is not a "covered claim" as that term is defined in the Act.

Application of Guaranty Association Act

Before addressing the legal issues presented in this appeal, it is necessary to set forth the relevant provisions of the Act. The Act applies "to all kinds of direct insurance"[8] and its purpose is

> to provide a method for the payment of certain claims against insolvent insurance companies . . . to avoid unnecessary delay in payment of such claims, to avoid financial loss to claimants or to policyholders, to assist in the detection and prevention of insurer insolvencies, and to provide an association of insurers against which the cost of such protection may be assessed in an equitable manner.[9]

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[6] *Alston v. Hormel Foods Corp.*, 273 Neb. 422, 730 N.W.2d 376 (2007).

[7] *Geddes v. York County*, 273 Neb. 271, 729 N.W.2d 661 (2007).

[8] § 44-2402.

[9] § 44-2401.

The Act further states that "[t]he association shall be obligated only to the extent of the covered claims existing prior to the date a member company becomes an insolvent insurer . . . ."[10]

A "covered claim" is defined in § 44-2403(4)(a) of the Act as

> an unpaid claim which has been timely filed with the liquidator as provided for in the Nebraska Insurers Supervision, Rehabilitation, and Liquidation Act and which arises out of and is within the coverage of an insurance policy to which [this Act] applies issued by a member insurer that becomes insolvent . . . .

Section 44-2403(4)(b) explains that a "[c]overed claim shall not include any amount due any . . . insurer . . . as subrogation recoveries or otherwise . . . ." Section 44-2403(4)(b) further provides that

> this section shall not prevent a person from presenting the excluded claim to the insolvent insurer or its liquidator, but the claim shall not be asserted against any other person, including the person to whom benefits were paid or the insured of the insolvent insurer, except to the extent that the claim is outside the coverage or is in excess of the limits of the policy issued by the insolvent insurer[.]

Given these provisions and the undisputed evidence that Alsobrook did not file his claim with the liquidator, it is clear that Alsobrook's claim is not a "covered claim" as that term is defined in the Act. Alsobrook argues that because his claim is not a "covered claim," the entire Act is inapplicable. Specifically, Alsobrook contends that § 44-2403(4)(b) cannot be used by Earp as a defense to Alsobrook's subrogation claim. We disagree.

The plain language of the Act reveals that the Legislature intended the Act to protect not only the claimants making claims on the Association, but also the insureds of an insolvent insurance company. One of the stated purposes of the Act is to avoid financial loss to policyholders.[11] And one of the ways in which the Legislature has accomplished this purpose is by

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[10] § 44-2406.

[11] § 44-2401.

prohibiting excluded claims from being asserted against the insured, except to the extent that a claim is outside the policy coverage or is in excess of the policy limits.[12]

[3] In construing a statute, a court must look to the statutory objective to be accomplished, the evils and mischiefs sought to be remedied, and the purpose to be served, and then must place a sensible construction upon the statute to effectuate the object of the legislation, rather than a construction that defeats the purpose of the statute.[13] To conclude that the claim must first be a "covered claim" before an insured is entitled to the defense granted in § 44-2403(4)(b), as urged by Alsobrook, would provide an insured the protection guaranteed by the Act only when the claimant has filed his or her claim with the liquidator.

Alsobrook's interpretation of the Act would give claimants the authority to determine if and when an insured is entitled to the protection of the Act. Alsobrook's interpretation is not dictated by the plain language of the Act and would circumvent one of the Act's express purposes, which is to protect policyholders of insolvent insurers. Accordingly, we conclude that a claim need not be a "covered claim" as defined by § 44-2403(4)(a) to be barred by § 44-2403(4)(b). Here, Alsobrook's claim against Earp is a subrogation claim and, therefore, pursuant to § 44-2403(4)(b), cannot be asserted against Earp, except to the extent that Alsobrook's claim is outside of or in excess of the insurance policy issued by Earp's insolvent insurer.[14]

Coverage Under Earp's Policy

Having determined that § 44-2403(4)(b) is applicable in the present case, we now apply its provisions. Section 44-2403(4)(b) bars Alsobrook's claim except to the extent the claim is outside the scope of Earp's insurance policy.

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[12] § 44-2403(4)(b).

[13] See, *Foster v. BryanLGH Med. Ctr. East*, 272 Neb. 918, 725 N.W.2d 839 (2007); *Chase 3000, Inc. v. Nebraska Pub. Serv. Comm.*, 273 Neb. 133, 728 N.W.2d 560 (2007).

[14] See, e.g., *Horton v. State Farm Ins. Co.*, 641 So. 2d 993 (La. App. 1994); *Window Coverings, Inc. v. Campbell*, 91 Ore. App. 335, 755 P.2d 719 (1988).

[4-6] The meaning of an insurance policy is a question of law, in connection with which an appellate court has an obligation to reach its own conclusions independently of the determination made by the lower court.[15] In construing insurance policy provisions, a court must determine from the clear language of the policy whether the insurer in fact insured against the risk involved.[16] In appellate review of an insurance policy, the court construes the policy as any other contract to give effect to the parties' intentions at the time the writing was made. Where the terms of a contract are clear, they are to be accorded their plain and ordinary meaning.[17]

Generally, the purpose of a garage policy is to protect automobile dealers, garage keepers, and owners of automobile service stations against loss by reason of injury to other property or persons by the use of their automobiles. Such policies are designed to care for the specialized needs of the particular operation.[18] As relevant here, the liability section of Earp's garage liability policy provides:

> SECTION II – LIABILITY COVERAGE
> A. COVERAGE
> . . . .
> We will pay all sums an "insured" legally must pay as damages because of . . . "property damage" to which this insurance applies, caused by an "accident" and resulting from "garage operations" involving the ownership, maintenance or use of covered "autos."
> . . . .
> B. EXCLUSIONS
> This insurance does not apply to any of the following:
> . . . .
> 13. WORK YOU PERFORMED

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[15] *Olson v. Le Mars Mut. Ins. Co.*, 269 Neb. 800, 696 N.W.2d 453 (2005).

[16] *Auto-Owners Ins. Co. v. Home Pride Cos.*, 268 Neb. 528, 684 N.W.2d 571 (2004).

[17] *Olson v. Le Mars Mut. Ins. Co., supra* note 15.

[18] *State Farm Mut. Auto. Ins. Co. v. Royal Ins. Co.*, 222 Neb. 13, 382 N.W.2d 2 (1986).

> "Property damage" to "work you performed" if the "property damage" results from any part of the work itself or from the parts, materials or equipment used in connection with the work.

Earp's garage liability policy also included a section dealing specifically with "garagekeepers coverage." This section states in relevant part:

> SECTION III – GARAGEKEEPERS COVERAGE
>
> A. COVERAGE
>
> 1. We will pay all sums the "insured" legally must pay as damages for "loss" to a covered "auto" or "auto" equipment left in the "insured's" care while the "insured" is attending, servicing, repairing, parking or storing it in your "garage operations" . . . .
>
> . . . .
>
> B. EXCLUSIONS
>
> 1. This insurance does not apply to any of the following:
>
> . . . .
>
> d. Faulty Work.
>
> Faulty "work you performed."

Given this policy language, Alsobrook argues that his claim against Earp does not fall within the policy's coverage. Alsobrook contends that because his claim is based on Earp's alleged negligent repair of Alsobrook's car, his claim is excluded under the "work you performed" and "faulty work" exclusions of the insurance policy, and can be brought directly against Earp. Earp, however, argues that its insurance policy with Reliance provided coverage for Alsobrook's claim and that because Reliance is now insolvent, Alsobrook's claim is barred by application of the Act.

As an initial matter, we conclude that the "faulty work" exclusion in section III of the policy is irrelevant. For section III to apply, the damages to the vehicle must have occurred "while [Earp was] attending, servicing, repairing, parking or storing [the car]." However, Alsobrook alleged in his complaint that the damages to his car occurred approximately 2 or 3 months after Earp negligently performed the repair work. Because the damages did not occur while Earp was performing work on

Alsobrook's car, section III of the policy does not cover those damages. In other words, Alsobrook need not concern himself with the "faulty work" exclusion, because section III is entirely inapplicable.

But Alsobrook's claim may be covered under section II of the policy, the liability coverage, unless it is excluded by the "work you performed" exclusion. We recently considered a similar provision in *Auto-Owners Ins. Co. v. Home Pride Cos.*[19] In *Auto-Owners Ins. Co.*, an apartment complex, Appletree Apartments, Inc. (Appletree), entered into a contract with Home Pride Companies, Inc. (Home Pride), to install new shingles on a number of apartment buildings. Following completion of the project, Appletree began to notice problems with the roof. Appletree eventually filed suit against Home Pride alleging that Home Pride failed to install the shingles in a workmanlike manner and that such faulty workmanship caused substantial and material damage to the roof structures and buildings. After the suit was filed, Home Pride made a claim to its insurer, Auto-Owners Insurance Company (Auto-Owners), for coverage under its commercial general liability policy. Auto-Owners brought a declaratory judgment action against Home Pride claiming that the insurance policy did not provide coverage because the faulty workmanship was not an "occurrence" under the policy.

We explained that "although faulty workmanship, *standing alone*, is not an occurrence under a [commercial general liability] policy, an accident caused by faulty workmanship is a covered occurrence."[20] We further explained that "if faulty workmanship causes bodily injury or property damage to something other than the insured's work product, an unintended and unexpected event has occurred, and coverage exists."[21] We noted that Appletree had alleged that Home Pride negligently installed shingles on the apartment buildings, which caused the shingles to fall off. Additionally, Appletree alleged that

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[19] *Auto-Owners Ins. Co. v. Home Pride Cos., supra* note 16.

[20] *Id.* at 535, 684 N.W.2d at 577 (emphasis in original).

[21] *Id.* at 535, 684 N.W.2d at 578.

as a consequence of the faulty work, the roof structures and buildings experienced substantial damage. We concluded that the latter allegation "represent[ed] an unintended and unexpected consequence of the contractors' faulty workmanship and goes beyond damages to the contractors' own work product."[22] Therefore, Appletree had properly alleged an "occurrence" within the meaning of the insurance policy.

Auto-Owners further argued that coverage was excluded under the "your work" exclusion in the policy. The "your work" exclusion provided that "'[t]his insurance does not apply to: . . . . Damages claimed for any loss, cost or expense incurred by you . . . for the loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal or disposal of: . . . . "Your work". . . .'"[23] We explained that "[g]enerally speaking, the 'your work' exclusions . . . operate to prevent liability policies from insuring against an insured's own faulty workmanship, which is a normal risk associated with operating a business."[24] We noted that "the rationale behind the 'your work' exclusions is that they discourage careless work by making contractors pay for losses caused by their own defective work, while preventing liability insurance from becoming a performance bond."[25]

In rejecting Auto-Owner's argument, we concluded that the "your work" exclusion did not exclude Appletree's damage claim "because [its] claim extends beyond the cost to simply repair and replace the contractors' work, i.e., to reshingle the roofs."[26] The claimed damages to the roof structure and buildings fell outside of the exclusion, and "to the extent that Home Pride may be found liable for the resulting damage to the roof structures and the buildings, Auto-Owners is obligated to provide coverage."[27] Courts in other jurisdictions that have addressed this issue have similarly concluded that damages

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[22] *Id.* at 537, 684 N.W.2d at 579.

[23] *Id.*

[24] *Id.* at 538, 684 N.W.2d at 579.

[25] *Id.*

[26] *Id.*

[27] *Id.* at 539, 684 N.W.2d at 580.

to property outside of the cost of repairing or replacing the insured's own work is not excluded under a "your work" exclusion and is therefore covered under the policy.[28]

In the present case, the "work you performed" exclusion in section II of Earp's policy excludes only those damages that represent the cost to either repair or replace the work that Earp was contracted to perform. But this exclusion does not act to exclude damages to property other than the work that Earp was contracted to perform, i.e., the damages to Alsobrook's vehicle that go beyond the cost to repair or replace Earp's allegedly negligent work. Here, the only indication in the record with respect to the actual repairs performed on Alsobrook's vehicle is found in Alsobrook's petition. The petition does not state with any clarity what exact repairs were requested. Nor is it evident from the petition what portion of the alleged damages represents the cost to repair or replace the work Earp was contracted to perform, versus damages to property beyond the scope of Earp's repair work. The petition simply provides a dollar amount representing the total damage to the car.

On this record, there is a genuine issue of material fact as to how much of Alsobrook's damages are covered under section IIA of the policy and how much is excluded by the "work you performed" exclusion. Therefore, the district court erred in concluding that Alsobrook's entire claim against Earp, besides the deductible, was barred as a matter of law.

With respect to Alsobrook's remaining assignment of error relating to the admission of Kovar's affidavit, we note that the record does not establish to what extent, if any, the court relied on that evidence in reaching its conclusion. Nonetheless, as Alsobrook argues, the scope of an insurance policy is a question of law, with respect to which we have made an independent determination, without reference to the Kovar affidavit. Because our independent analysis cures any error in receiving the affidavit, we need not consider this assignment of error.

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[28] See, e.g., *Garrett v. Auto-Owners Ins. Co.*, 689 So. 2d 179 (Ala. App. 1997); *Travelers Ins. Co. v. Volentine*, 578 S.W.2d 501 (Tex. Civ. App. 1979).

CONCLUSION

We conclude that a claim need not be a "covered claim" as defined in § 44-2403(4)(a) to be barred by § 44-2403(4)(b). Section 44-2403(4)(b) prohibits subrogation claims from being asserted against an insured of an insolvent insurer, except to the extent that the claim is outside of or in excess of the insurance policy issued by the insolvent insurer. The district court erred in concluding, as a matter of law, that Alsobrook's entire claim, in excess of the deductible, is barred by the Act. Because there is a genuine issue of material fact as to what damages are covered and excluded under the insurance policy, we reverse the judgment of the district court and remand the cause for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

WRIGHT, J., not participating.

CITIZENS OPPOSING INDUSTRIAL LIVESTOCK AND VILLAGE BOARD OF REYNOLDS, NEBRASKA, APPELLANTS, V. JEFFERSON COUNTY BOARD OF ADJUSTMENT, APPELLEE.

740 N.W.2d 362

Filed October 26, 2007. No. S-06-486.

1. **Motions to Dismiss: Rules of the Supreme Court: Pleadings: Appeal and Error.** Aside from factual findings, which are reviewed for clear error, the granting of a motion to dismiss for lack of subject matter jurisdiction under Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(1) (rev. 2003) is subject to de novo review.
2. **Standing: Jurisdiction.** The defect of standing is a defect of subject matter jurisdiction.
3. **Motions to Dismiss.** The stage of the litigation at which a motion to dismiss is filed informs the court of the necessity of holding an evidentiary hearing on the motion.

Appeal from the District Court for Jefferson County: PAUL W. KORSLUND, Judge. Reversed and remanded for further proceedings.

Steven M. Virgil, Patricia Knapp, and, on brief, James M. Buchanan for appellants.

Daniel L. Werner, P.C., L.L.O., for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MILLER-LERMAN, J.

NATURE OF CASE

This is the second appearance of this case before this court. Citizens Opposing Industrial Livestock (COIL) and the village board of Reynolds (the village), appellants, filed an action with the district court for Jefferson County against appellee, the Jefferson County Board of Adjustment (the board). Appellants challenged the board's ruling that approved a special use permit allowing the operation of a finishing site for swine. In *Citizens Opposing Indus. Livestock v. Jefferson Cty.*, 269 Neb. 725, 695 N.W.2d 435 (2005) (*COIL I*), we concluded that the lack of verification of the petition did not defeat jurisdiction, and we reversed the district court's order of dismissal and remanded the cause for further proceedings.

Following remand, a bench trial was conducted on appellants' amended petition. After the trial had concluded, the board filed a motion to dismiss, claiming that the district court did not have subject matter jurisdiction because appellants lacked standing to bring the action. Appellants objected to the motion. Following a nonevidentiary hearing, the district court entered an order sustaining the board's motion and dismissing the action. Appellants appeal. Because we conclude that the district court erred by failing to hold an evidentiary hearing on the board's motion challenging appellants' standing, we reverse the district court's order and remand the cause for further proceedings.

STATEMENT OF FACTS

As noted above, this is the second appearance of this case before this court. The following facts are recited in *COIL I*:

> In February 2004, the Jefferson County Board of Commissioners approved a special use permit to allow the operation of a finishing site for swine. In March, the board of adjustment affirmed the board of commissioners' decision.
>
> COIL and the village filed a petition in the district court challenging the ruling by the board . . . . The petition

> was signed by COIL and the village's attorney, but did not include a verification affidavit. The board of adjustment moved to dismiss, contending that the district court lacked jurisdiction because the petition was not verified as required by [Neb. Rev. Stat.] § 23-168.04.
>
> The district court determined that the petition was not duly verified and that the failure to file a verified petition was jurisdictional. So the court dismissed the petition, and COIL and the village appeal[ed].

COIL I, 269 Neb. at 726, 695 N.W.2d at 436.

Neb. Rev. Stat. § 23-168.04 (Reissue 1997) provides, inter alia, that anyone aggrieved by a decision of a board of adjustment may file a "petition" with the district court, "duly verified," setting forth the purported illegality in the board's decision. In *COIL I*, we determined that the verification requirement contained in § 23-168.04 was not jurisdictional, and as a result, we reversed the district court's order dismissing appellants' petition, and we remanded the cause for further proceedings.

After remand, appellants filed an amended petition in which the only change from the original petition was the addition of a verification. Subsequent to appellants' filing their amended petition, the district court ruled that the board's original answer would "serve as answer to the amended petition." In its answer, the board generally denied appellants' allegations in their amended petition to the effect that they possessed an interest in the litigation. The board did not specifically assert that appellants lacked standing to bring the instant action.

On September 16, 2005, the district court held a bench trial on appellants' amended petition. The evidence at trial focused on the merits of the amended petition. No discussion or challenge to appellants' standing was raised at trial. On November 14, following trial and before resolution of the underlying case, the board filed a motion to dismiss, claiming that "neither [COIL] nor [the village] has standing to invoke the jurisdiction of this court." On December 9, an objection to the board's motion was filed on behalf of appellants.

Both the motion to dismiss and the objection to the motion were argued on January 19, 2006. The board argued that appellants had failed to prove at trial that they had standing to bring

the lawsuit, and as a result, the district court lacked subject matter jurisdiction. None of the parties offered evidence at the hearing. Counsel for appellants argued that an evidentiary hearing was needed in order to address the board's assertion that appellants lacked standing. The district court did not set the motion for an evidentiary hearing.

In an order filed March 30, 2006, the district court concluded that it lacked subject matter jurisdiction because appellants had not adduced evidence at trial demonstrating that either COIL or the village was a proper party plaintiff in the litigation. The district court sustained the board's motion and dismissed appellants' amended petition for lack of standing. Appellants appeal.

ASSIGNMENT OF ERROR

On appeal, appellants assign two errors that can be summarized as claiming that the district court erred in dismissing appellants' amended petition for lack of jurisdiction.

STANDARD OF REVIEW

[1] This action was filed on March 25, 2004, and thus, we apply the new rules for notice pleading. See Neb. Ct. R. of Pldg. in Civ. Actions 1 (rev. 2004). Aside from factual findings, which are reviewed for clear error, the granting of a motion to dismiss for lack of subject matter jurisdiction under Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(1) (rev. 2003) is subject to de novo review. See *Bohaboj v. Rausch*, 272 Neb. 394, 721 N.W.2d 655 (2006).

ANALYSIS

The issue presented to this court on appeal is whether, given the stage of the litigation, the district court erred in granting the board's motion to dismiss for lack of standing without first holding an evidentiary hearing. As we have noted above, appellants' action was filed on March 25, 2004, and thus, we apply the new rules for notice pleading. Initially, we note that the board's motion was captioned "Motion to Dismiss." The board did not specifically identify its motion as one filed under rule 12(b)(1). Rule 12(b)(1) provides as follows:

> **(b) How Presented.** Every defense, in law or fact, to a claim for relief in any pleading, whether a claim,

> counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:
>
> (1) lack of jurisdiction over the subject matter.

[2] The board's motion stated that appellants lacked standing. The defect of standing is a defect of subject matter jurisdiction. See, generally, *Chambers v. Lautenbaugh*, 263 Neb. 920, 927, 644 N.W.2d 540, 547 (2002) (stating that "[a]s an aspect of jurisdiction . . . , standing requires that a litigant have such a personal stake in the outcome of a controversy as to warrant invocation of a court's jurisdiction and justify the exercise of the court's remedial powers on the litigant's behalf"). Accordingly, we review the board's motion as one seeking dismissal of appellants' amended petition for lack of subject matter jurisdiction filed under rule 12(b)(1).

On appeal, appellants argue that the district court erred when it sustained the board's motion to dismiss based on lack of standing without conducting an evidentiary hearing. Appellants note that although a trial was held on their amended petition, the board did not raise a specific challenge to appellants' standing until after the trial had concluded. Given the procedural posture of the case and the stage of the litigation, appellants assert they were entitled to an evidentiary hearing on the standing issue raised in the board's posttrial motion to dismiss. Appellants assert they are entitled to a reversal of the order of dismissal. We agree with appellants that the district court erred in dismissing appellants' amended petition without affording the parties the opportunity to establish the factual background necessary to permit the district court to resolve the standing issue.

Because Nebraska's notice pleading rules are modeled after the Federal Rules of Civil Procedure, we look to federal court decisions for guidance. See *Bohaboj v. Rausch, supra*. We recently considered the nature of a motion to dismiss under rule 12(b)(1) in *Washington v. Conley*, 273 Neb. 908, 912-13, 734 N.W.2d 306, 311 (2007), stating as follows:

> It is well established in federal courts that there are two ways a party may challenge the court's subject matter jurisdiction under rule 12(b)(1). The first way is a facial

attack which challenges the allegations raised in the complaint as being insufficient to establish that the court has jurisdiction over the subject matter of the case. [See, *White v. Lee*, 227 F.3d 1214 (9th Cir. 2000); *Courtney v. Choplin*, 195 F. Supp. 2d 649 (D.N.J. 2002); *Zelaya v. J.M. Macias, Inc.*, 999 F. Supp. 778 (E.D.N.C. 1998).] In a facial attack, a court will look only to the complaint in order to determine whether the plaintiff has sufficiently alleged a basis of subject matter jurisdiction. [See *VanHorn v. Nebraska State Racing Comm.*, 273 Neb. 737, 732 N.W.2d 651 (2007). See, also, *Beatty v. U.S. Food and Drug Admin.*, 12 F. Supp. 2d 1339 (S.D. Ga. 1997); *Cohen v. Temple Physicians, Inc.*, 11 F. Supp. 2d 733 (E.D. Pa. 1998).] The second type of challenge is a factual challenge where the moving party alleges that there is in fact no subject matter jurisdiction, notwithstanding the allegations presented in the complaint. [See, *St. Clair v. City of Chico*, 880 F.2d 199 (9th Cir. 1989); *Beatty v. U.S. Food and Drug Admin., supra*.] In a factual challenge, the court may consider and weigh evidence outside of the pleadings to answer the jurisdictional question. [See, *Krohn v. Forsting*, 11 F. Supp. 2d 1082 (E.D. Mo. 1998); *Rodriguez v. Texas Com'n on Arts*, 992 F. Supp. 876 (N.D. Tex. 1998), *affirmed* 199 F.3d 279 (5th Cir. 2000).]

[3] The federal courts have recognized that the stage of the litigation at which a motion to dismiss is filed informs the court of the necessity of holding an evidentiary hearing on the motion. If the motion is filed at the pleadings stage and the motion challenges the sufficiency of the complaint to invoke the court's jurisdiction, then the district court will review the pleadings to determine whether there are sufficient allegations to establish the plaintiff's standing. See, *Bischoff v. Osceola County, Fla.*, 222 F.3d 874 (11th Cir. 2000); *Haase v. Sessions*, 835 F.2d 902 (D.C. Cir. 1987). See, also, 5B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1350 (3d ed. 2004 & Supp. 2007). As indicated above, this is considered a facial challenge to standing.

If, however, the motion to dismiss is filed at a later stage in the litigation, then the parties can no longer rely on the "'mere

allegations'" in the complaint. See *Bischoff v. Osceola County, Fla.*, 222 F.3d at 878 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)). This is considered a factual challenge to standing. When a defendant has raised a factual challenge to the plaintiff's standing, the federal courts have stated that the trial court should conduct an evidentiary hearing to squarely present the standing issue before the court and resolve the factual dispute. See *Bischoff v. Osceola County, Fla.*, 222 F.3d at 879 (discussing that evidentiary hearing "must" be held in order to "decide disputed factual questions or make findings of credibility essential to the question of standing"). See, also, *Linnemeier v. Indiana University-Purdue University*, 155 F. Supp. 2d 1044, 1050 (N.D. Ind. 2001) (stating that "when faced with standing issues, courts are required to hold an evidentiary hearing to determine disputed factual issues").

In the instant case, the board's unsupported motion to dismiss appellants' amended petition for lack of standing was filed after trial during the later stages of the litigation and asserted a factual challenge to appellants' standing in the case. The district court did not hold an evidentiary hearing on the board's motion. Before the district court and on appeal, the board argues to the effect that an evidentiary hearing was not needed regarding the standing issue because the parties had just concluded a trial on the merits and the district court could rely on the evidence adduced at trial. While the record below is unclear, it appears that the district court accepted this approach and decided the board's motion, relying, at least in part, on the trial record, despite appellants' argument during the proceedings below that an evidentiary hearing was required on the standing issue. In this regard, we quote the following pronouncement from the district court at the conclusion of the argument on the board's motion to dismiss: "Well, obviously, I've deferred ruling. I have read the briefs and reviewed all of the evidence and the Bill of Exceptions or transcription of the hearing. So I will try to get a decision to you fairly promptly."

The district court's failure to hold an evidentiary hearing denied appellants the opportunity to address the board's factual assertion that appellants lacked standing. Although the board

generally denied appellants' allegations in their amended petition with respect to their individual interests in the litigation, the board did not put appellants on notice that standing was contested until after the trial had concluded, thereby effectively depriving appellants of an opportunity to offer evidence at trial on the standing issue. See *Church v. City of Huntsville*, 30 F.3d 1332, 1336 (11th Cir. 1994) (stating that "as a matter of fairness, the City's failure to question the plaintiffs' standing" until later in proceedings "does affect the standard to which we will hold plaintiffs . . . . It might well be unfair . . . to impose a standing burden beyond the sufficiency of the allegations of the pleadings on a plaintiff . . . unless the defendant puts the plaintiff on notice that standing is contested").

Given the board's factual challenge to appellants' standing, we conclude that the parties should have been given an opportunity to present evidence relating to the standing issue raised in the board's motion to dismiss. See, *Bischoff v. Osceola County, Fla.*, 222 F.3d 874 (11th Cir. 2000); *Church v. City of Huntsville*, *supra*; *Haase v. Sessions*, 835 F.2d 902 (D.C. Cir. 1987). We conclude that the district court erred in failing to give the parties the opportunity to establish the factual background necessary to permit the district court to resolve the factually disputed standing issue. We therefore reverse the district court's order dismissing appellants' amended petition and remand the cause for further proceedings consistent with this opinion.

CONCLUSION

For the reasons stated above, given the stage of the litigation at which standing was raised as an issue, we conclude that the district court erred in failing to hold an evidentiary hearing on the board's motion to dismiss for lack of subject matter jurisdiction due to lack of standing filed pursuant to rule 12(b)(1). Accordingly, we reverse the district court's decision dismissing the action and remand the cause for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, V. ELROY L. WABASHAW, ALSO KNOWN AS ELROY L. WABASHA, ALSO KNOWN AS JOHNNY LEE BEARSHIELD, APPELLANT.

740 N.W.2d 583

Filed October 26, 2007. No. S-06-642.

1. **Criminal Law: Jurisdiction.** By enacting Public Law 280 in 1953, Congress granted Nebraska jurisdiction over criminal offenses committed by or against Indians in Indian country within Nebraska.
2. **Jurisdiction: Time.** A state's retrocession of jurisdiction over Indian country is not effective until the federal government accepts it.
3. ____: ____. Nebraska's retrocession of jurisdiction over the Santee Sioux Reservation was not effective until February 15, 2006.
4. **Criminal Law: Jurisdiction: Time.** Nebraska did not lose jurisdiction over crimes committed before the effective date of its retrocession of jurisdiction.
5. **Criminal Law: Jurisdiction.** Nebraska has jurisdiction over offenses in Indian country when a non-Indian commits a crime against another non-Indian.
6. **Intent.** Congress may abrogate Indian treaty rights, but it must clearly express its intent to do so.
7. **Criminal Law: Jurisdiction.** By enacting Public Law 280, Congress intended to subject Indians to Nebraska's jurisdiction and criminal laws and to abrogate any inconsistent treaty provisions.
8. **Right to Counsel.** An indigent defendant's right to have counsel does not give the defendant the right to choose his or her own counsel.
9. ____. Mere distrust of, or dissatisfaction with, appointed counsel is not enough to secure the appointment of substitute counsel.
10. **Habitual Criminals.** A prior conviction and the identity of the accused as the person convicted may be shown by any competent evidence, including oral testimony of the accused and authenticated records maintained by the courts or penal and custodial authorities.
11. **Evidence: Expert Witnesses: Identification Procedures.** Fingerprint identity testified to by an expert is perhaps the best known method of the highest probative value in establishing identification.
12. **Prior Convictions: Records: Names.** An authenticated record establishing a prior conviction of a defendant with the same name is prima facie evidence sufficient to establish identity for enhancing punishment.
13. ____: ____: ____. Absent any denial or contradictory evidence, an authenticated record establishing a prior conviction of a defendant with the same name is sufficient to support a finding of a prior conviction.
14. **Names.** Under the idem sonans doctrine, a mistake in the spelling of a name is immaterial if both modes of spelling have the same sound and appearance.
15. **Sentences: Prior Convictions: Habitual Criminals: States: Time.** Nebraska's habitual criminal statute, Neb. Rev. Stat. § 29-2221 (Reissue 1995), does not impose a time limit for using a prior conviction or provide that an out-of-state conviction may be used only if it could be used for enhancement in that other state.

16. **Constitutional Law: Sentences: Prior Convictions: States.** The Full Faith and Credit Clause does not prevent a Nebraska court from enhancing a defendant's sentence based upon a conviction in another state that could not be used for enhancement in that state.
17. **Effectiveness of Counsel: Appeal and Error.** An appellate court need not dismiss an ineffective assistance of counsel claim merely because a defendant raises it on direct appeal.
18. **Effectiveness of Counsel: Records: Appeal and Error.** When a claim of ineffective assistance of counsel is made on direct appeal, the determining factor is whether the record is sufficient to adequately review the question.
19. **Trial: Effectiveness of Counsel: Evidence: Appeal and Error.** If an ineffective assistance of counsel claim is not raised at the trial level and it requires an evidentiary hearing, an appellate court will not address the matter on direct appeal.
20. **Trial: Effectiveness of Counsel: Proof: Appeal and Error.** To establish a right to relief because of ineffective counsel at trial or on direct appeal, the defendant has the burden first to show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area. Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case.
21. **Effectiveness of Counsel: Proof: Words and Phrases.** In an ineffective assistance of counsel claim, to prove prejudice, the defendant must show that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.
22. **Convictions.** When a defendant challenges a conviction, the question is whether there is a reasonable probability that absent the errors, the fact finder would have had a reasonable doubt concerning guilt.
23. **Effectiveness of Counsel: Conflict of Interest.** The right to effective assistance of counsel generally requires that the defendant's attorney be free from any conflict of interest.
24. ____: ____. The phrase "conflict of interest" denotes a situation in which a lawyer might disregard one duty for another or when a lawyer's representation of one client is rendered less effective because of his or her representation of another client.
25. ____: ____. A conflict of interest must be actual, rather than speculative or hypothetical, before a court can overturn a conviction because of ineffective assistance of counsel.
26. **Attorneys at Law: Conflict of Interest.** Disqualification is appropriate when a conflict of interest could cause the defense attorney to improperly use privileged communications or deter the defense attorney from intense probing on cross-examination.

Appeal from the District Court for Knox County: PATRICK G. ROGERS, Judge. Affirmed.

Jerry L. Soucie, of Nebraska Commission on Public Advocacy, and, on brief, Mark A. Johnson, of Johnson, Morland, Easland & Lohrberg, P.C., for appellant.

Jon Bruning, Attorney General, James D. Smith, and, on brief, Susan J. Gustafson for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

CONNOLLY, J.

Elroy L. Wabashaw appeals his convictions for robbery and use of a firearm to commit a felony. Before his jury trial, Wabashaw moved to quash the information. He argues that article I of the "1868 Treaty between the United States of America and different Tribes of Sioux Indians" (1868 Treaty) and article VI of the U.S. Constitution barred his prosecution. The district court overruled the motion. A jury found Wabashaw guilty on both charges, and the district court sentenced Wabashaw as a habitual criminal under Neb. Rev. Stat. § 29-2221 (Reissue 1995).

Although Wabashaw raises several issues on appeal, the main issue is whether the district court had jurisdiction over the robbery that occurred in Indian country. We conclude that the district court had jurisdiction over the offense and that the relevant provision of the 1868 Treaty did not divest the district court of jurisdiction. We affirm.

I. BACKGROUND

Monica Kitto testified that she was working at a gas station on April 8, 2005, when a person dressed in black and wearing a white scarf around his face came into the gas station. The robber pointed a gun at Kitto and gave her a note directing her to put money in a bag, and she did as instructed. Kitto estimated that the total amount taken was a little more than $500. The robber then took the women's restroom key, threw it at Kitto, and told her to go to the restroom. Kitto stayed inside the restroom 2 to 3 minutes before she came out and called the police.

Kitto testified that she could not see the robber's face or hands because they were covered. Although she could not recognize the robber's voice, she described him as slim, 5 feet 8 inches to 5 feet 10 inches tall.

Acting on a tip, Santee Police Chief Michael G. Vance met with Wabashaw at the police station. As Vance began questioning Wabashaw, Officer Robert Henry was present, but Henry left on a police call and did not witness the entire interview. Vance read Wabashaw his *Miranda* rights and told Wabashaw that Vance wanted to talk about the robbery. Wabashaw signed a waiver of his *Miranda* rights and initially stated he had nothing to do with the robbery. Vance then told him that police had recovered some clothing articles left at a sweat lodge. Vance also told him a DNA analysis on the clothing would match Wabashaw. Upon hearing this, Wabashaw told Vance that he "'did it'" and that he had acted alone. When Vance asked Wabashaw about the gun used in the robbery, he stated he left the rifle in a field when he was running from a police officer. After making this admission to Vance, Wabashaw wrote and signed a statement stating he committed the robbery. Because Henry was present at part of the interview, Vance signed Henry's name and his own at the bottom of Wabashaw's written statement.

Later, the State charged Wabashaw with robbery and use of a weapon to commit a felony. Wabashaw moved to quash the information. He alleged that the prosecution was unconstitutional, as prohibited by the 1868 Treaty and article VI of the U.S. Constitution. The court overruled the motion to quash.

Before trial, the State submitted handwriting samples to a laboratory for analysis. Claiming the written confession was a forgery, Wabashaw moved to have a handwriting expert appointed. The court granted his motion. The record does not show whether Wabashaw's trial counsel ever obtained the expert. Wabashaw argues on appeal that he was denied effective assistance of counsel because counsel failed to obtain a handwriting expert.

At trial, the State called four witnesses, including Vance and a handwriting expert. The handwriting expert compared more than 26 known writings and concluded that Wabashaw was the

individual who wrote the written confession. Wabashaw's counsel cross-examined each of the State's witnesses except Vance, reserving examination of Vance for Wabashaw's case in chief.

A jury found Wabashaw guilty of robbery and use of a firearm to commit a felony. At the enhancement hearing, the court received certified records for a 1977 South Dakota conviction. The court admitted records of the 1977 conviction and another prior conviction. The court found Wabashaw to be a habitual criminal. It sentenced him to consecutive prison terms of 12 to 14 years for the robbery conviction and 10 to 12 years on the weapons conviction.

II. ASSIGNMENTS OF ERROR

Wabashaw assigns, rephrased and reordered, that the district court erred by (1) overruling Wabashaw's motion to quash, (2) not conducting an evidentiary hearing on Wabashaw's motions to allow counsel to withdraw and to appoint substitute counsel, (3) determining that the State sufficiently proved identity to use a prior conviction to enhance Wabashaw's sentence, and (4) accepting a prior conviction from South Dakota for enhancement when South Dakota law precludes the use of the conviction for enhancement purposes.

Wabashaw also assigns that he was denied effective assistance of counsel. He claims his attorney (1) had a conflict of interest when he had previously represented Henry, who was called as a witness; (2) failed to request an evidentiary hearing on Wabashaw's motion to quash; (3) failed to object to references to evidence recovered by the police; (4) failed to file a motion to suppress Wabashaw's confession as fruit of the poisonous tree; (5) failed to cross-examine Vance during the State's case in chief; and (6) failed to obtain a handwriting expert.

III. STANDARD OF REVIEW

Regarding questions of law presented by a motion to quash, we resolve the questions independently of the lower court's conclusions.[1]

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[1] See *State v. Gozzola*, 273 Neb. 309, 729 N.W.2d 87 (2007).

IV. ANALYSIS

1. The District Court Had Jurisdiction Over Wabashaw's Prosecution

Wabashaw argues that the district court did not acquire jurisdiction over him because his arrest, detainment, and prosecution violated article I of the 1868 Treaty and article VI of the U.S. Constitution. After Wabashaw's counsel had briefed to this court, we appointed Wabashaw new counsel. During oral argument, Wabashaw's new counsel argued that the record is insufficient for us to decide the jurisdictional issue. Counsel suggested that to address the issue, we would need to know whether Wabashaw is an Indian, and that evidence is not in the record. We have determined, however, that the court had jurisdiction regardless of whether Wabashaw is an Indian or a non-Indian.

(a) Background Concerning Public Law 280

[1] By enacting Public Law 280 in 1953, Congress granted Nebraska jurisdiction over criminal offenses committed by or against Indians in Indian country. Public Law 280 is now codified at 18 U.S.C. § 1162(a) (2000), which provides that Nebraska

> shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country . . . to the same extent that [Nebraska] has jurisdiction over offenses committed elsewhere within [Nebraska], and the criminal laws of [Nebraska] shall have the same force and effect within such Indian country as they have elsewhere within [Nebraska].

The record shows that the gas station is in Knox County, Nebraska, within the Santee Sioux Nation—Indian country—which brings the robbery within the purview of Public Law 280.

[2,3] In 1968, Congress provided for the voluntary abandonment of the jurisdiction granted by Public Law 280.[2] In 2001, the Nebraska Legislature offered retrocession of criminal and

[2] See 25 U.S.C. § 1323 (2000).

civil jurisdiction over the Santee Sioux Reservation.[3] We note that the Legislature's resolution called for an effective date of July 1, 2001, but retrocession is not effective until the federal government accepts it.[4] The federal government did not immediately accept the Legislature's 2001 offer of retrocession; it was not effective until February 15, 2006.[5] The retrocession, therefore, was not yet effective when the robbery occurred in April 2005 or when the State charged Wabashaw in the district court that same month.

[4] In a case involving retrocession of jurisdiction over a different reservation, we considered the effect of retrocession on pending cases and crimes committed before acceptance.[6] We decided that Nebraska did not abandon jurisdiction over crimes committed before the federal government's acceptance of retrocession.[7] So, any jurisdiction the State had over the robbery under Public Law 280 in 2005 was not lost when the retrocession became effective in 2006.

(b) District Court Had Jurisdiction Regardless of the Indian Status of Wabashaw or His Victim

Wabashaw's counsel stated during oral argument that we did not have a sufficient record to determine jurisdiction because the record failed to state whether Wabashaw is an Indian. We determine that regardless of whether Wabashaw is an Indian, the court had jurisdiction.

Public Law 280 gives Nebraska jurisdiction "over offenses committed *by or against Indians* in the areas of Indian country."[8] The robbery occurred in Indian country. Therefore, if

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[3] L.R. 17, Legislative Journal, 97th Leg., 1st Sess. 2356, 2358-59 (May 31, 2001).

[4] See *State v. Goham*, 187 Neb. 34, 187 N.W.2d 305 (1971). See, also, Executive Order No. 11435, 33 Fed. Reg. 17,339 (Nov. 21, 1968).

[5] See Notice of Acceptance of Retrocession of Jurisdiction for the Santee Sioux Nation, NE, 71 Fed. Reg. 7994 (Feb. 15, 2006).

[6] See *State v. Goham*, 191 Neb. 639, 216 N.W.2d 869 (1974).

[7] *Id.*

[8] See 18 U.S.C. § 1162(a) (2000) (emphasis supplied).

either Wabashaw or his victim is an Indian, Nebraska has jurisdiction.

[5] The only other possibility is that neither Wabashaw nor his victim is an Indian. Yet even in that scenario, Nebraska has jurisdiction because when a non-Indian commits a crime against another non-Indian in Indian country, jurisdiction rests in the state.[9]

Under all possible permutations, the court had jurisdiction. So, we can resolve the jurisdictional issue despite the record's lack of information regarding Wabashaw's Indian status.

(c) The 1868 Treaty Did Not Divest the District Court of Jurisdiction

Having determined that jurisdiction does not depend on Wabashaw's Indian status, we now analyze the 1868 Treaty. We assume that Wabashaw is an Indian because the 1868 Treaty provision on which he relies is irrelevant if he is not an Indian.

Wabashaw argues that the court lacked jurisdiction over him because his arrest, detainment, and prosecution violated article I of the 1868 Treaty and article VI of the U.S. Constitution. Thus, he concludes that the court erred in overruling his motion to quash.

Wabashaw relies on article I of the 1868 Treaty, which states:

> If bad men among the Indians shall commit a wrong or depredation upon the person or property of any one, white, black, or Indian, subject to the authority of the United States, and at peace therewith, the Indians herein named solemnly agree that they will, upon proof made to their agent and notice by him, deliver up the wrong-doer to the United States, to be tried and punished according to its laws . . . .[10]

Wabashaw argues that no notice was given to a designated Santee tribal agent to deliver him over to U.S. authorities.

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[9] See *United States v. McBratney*, 104 U.S. 621, 26 L. Ed. 869 (1881).

[10] Treaty between the United States of America and different Tribes of Sioux Indians, April 29, 1868, 15 Stat. 635.

Therefore, he argues the court was without jurisdiction until he was brought properly before it under the method described in the 1868 Treaty.

We do not believe the plain language of the 1868 Treaty imposes the notice requirement that Wabashaw suggests. Yet, even if we construe the language to impose such a notice requirement, we determine that Congress has abrogated the requirement.

[6,7] Congress may abrogate Indian treaty rights, but it must clearly express its intent to do so.[11] By enacting Public Law 280, Congress clearly intended to subject Indians to Nebraska's jurisdiction and criminal laws and to abrogate any inconsistent treaty provisions. The purported notice requirement in the 1868 Treaty imposes an obligation that does not exist under Nebraska criminal law and, as such, is inconsistent with Nebraska law. Additionally, if we concluded that the State lacks jurisdiction because the arresting authority did not comply with the notice requirement, it would be inconsistent with Congress' clear intent to subject Indians to Nebraska's jurisdiction.

We conclude that even if we construe the 1868 Treaty language to impose a notice requirement, Congress abrogated the provision by enacting Public Law 280.

In passing, we note that the U.S. Court of Appeals for the Eighth Circuit recently rejected an argument similar to Wabashaw's claim.[12] Although the Eighth Circuit did not rely on Public Law 280, the court determined that Congress had abrogated any notice provision in the 1868 Treaty when it enacted a separate statute to give Indians citizenship.

We conclude that Wabashaw's first assignment of error is without merit because the 1868 Treaty did not divest the court of jurisdiction. The court did not err in overruling Wabashaw's motion to quash.

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[11] *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 119 S. Ct. 1187, 143 L. Ed. 2d 270 (1999).

[12] See *U.S. v. Drapeau*, 414 F.3d 869 (8th Cir. 2005), *cert. denied* 546 U.S. 1119, 126 S. Ct. 1090, 163 L. Ed. 2d. 906 (2006).

2. The District Court Did Not Err in Failing to Conduct an Evidentiary Hearing

Wabashaw contends that the court erred when it did not hold an evidentiary hearing on his motion to allow trial counsel to withdraw and to appoint substitute counsel. Wabashaw made two motions to allow his trial counsel to withdraw: the first was for an alleged conflict of interest, and the second was for Wabashaw's assertion that counsel was not giving Wabashaw all the materials he requested. The court denied both motions. Wabashaw now argues that the court had a duty to conduct an evidentiary hearing to determine whether a basis existed for substituting counsel.

Wabashaw's argument is without merit. First, assuming the court erred in failing to conduct an evidentiary hearing on the alleged conflict of interest, it was not prejudicial. As shown later in our discussion, the alleged conflict of interest did not result in ineffective assistance. So, any error by the court in failing to conduct an evidentiary hearing on the first motion did not prejudice Wabashaw's defense.

[8,9] Next, the court did not err in failing to hold an evidentiary hearing on Wabashaw's second motion to appoint substitute counsel. An indigent defendant's right to have counsel does not give the defendant the right to choose his or her own counsel.[13] Mere distrust of, or dissatisfaction with, appointed counsel is not enough to secure the appointment of substitute counsel.[14] At the hearing on Wabashaw's second motion, he stated that trial counsel had not given him materials to prepare "live questions" for the witnesses. For this reason—and other similar dissatisfactions with trial counsel's conduct—Wabashaw sought to have the court discharge counsel and appoint substitute counsel. Wabashaw did not have the right to choose counsel, and his dissatisfaction with trial counsel was insufficient to secure substitute counsel. Because Wabashaw's asserted grounds for discharging counsel and appointing new counsel were insufficient, there was no reason for the court to conduct an evidentiary hearing.

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[13] See *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000).

[14] *Id.*

3. The State Provided Sufficient Proof of Identity to Use a South Dakota Conviction for Enhancement

Wabashaw contends that the district court erred during the enhancement stage. He argues that the State failed to prove that an "Elroy Wabasha" who was convicted for robbery in 1977 in South Dakota was the same person as the defendant in this case, "Elroy Wabashaw." The State contends that the evidence at the enhancement hearings established the two defendants were the same.

Wabashaw argues that during the enhancement hearing, the court received testimony comparing two photographs, both alleged to be of Wabashaw. He argues that the court erred in overruling his hearsay and authentication objection and that the ruling was prejudicial. However, we need not determine whether the court erred in overruling Wabashaw's objection. Assuming the court committed an error, it did not prejudice Wabashaw because the record contained sufficient evidence to prove his identity.

[10,11] A prior conviction and the identity of the accused as the person convicted may be shown by any competent evidence.[15] This includes the oral testimony of the accused and authenticated records maintained by the courts or penal and custodial authorities.[16] We have stated that fingerprint identity testified to by an expert is perhaps the best known method of the highest probative value in establishing identification.[17]

Fingerprints of "Elroy Wabasha" were taken in 1981 when he was serving his 15-year sentence for the 1977 robbery conviction. Knox County authorities also took fingerprints from Wabashaw when he was in jail in April 2005. At the enhancement hearing, the parties stipulated that if called to testify, a fingerprint examiner would conclude that the same individual contributed the fingerprints in both the 1981 set and the 2005 set. As we have stated, this fingerprint evidence is perhaps the best known method of establishing identity.

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[15] See *State v. Luna*, 211 Neb. 630, 319 N.W.2d 737 (1982).

[16] *Id.*

[17] *Id.*

[12,13] We have also stated that an authenticated record establishing a prior conviction of a defendant with the same name is prima facie evidence sufficient to establish identity for enhancing punishment. And absent any denial or contradictory evidence, it is sufficient to support a finding of a prior conviction.[18]

The court received a certified copy of the conviction from the 1977 robbery case. The defendant's name appears as "Elroy Wabasha" in the authenticated record, though the defendant's name in the present case is "Elroy Wabashaw."

[14] Under the idem sonans doctrine, a mistake in the spelling of a name is immaterial if both modes of spelling have the same sound and appearance.[19] Here, the spelling discrepancy is immaterial. Thus, the certified copy of the conviction in the 1977 robbery case was an "authenticated record establishing a prior conviction of a defendant *with the same name.*" Therefore, the record is prima facie evidence sufficient to establish identity for enhancing punishment.[20] Furthermore, Wabashaw has not offered any evidence or claimed that he is not the same person referred to in the prior conviction record.

We conclude that the court did not err in determining the State sufficiently proved Wabashaw was the same person as the "Elroy Wabasha" who was convicted in the 1977 South Dakota robbery case.

4. Nebraska Could Use Wabashaw's 1977 Conviction for Enhancement Although South Dakota Would No Longer Permit Use of the Conviction for Enhancement

Wabashaw contends that the district court erred in accepting his 1977 South Dakota robbery conviction to enhance his sentence. He argues South Dakota law precludes use of the conviction for enhancement purposes. Wabashaw relies on S.D. Codified Laws § 22-7-9 (2004), which states in part: "A prior conviction may not be considered under [South Dakota's

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[18] *State v. Thomas*, 268 Neb. 570, 685 N.W.2d 69 (2004).

[19] *State v. King*, 272 Neb. 638, 724 N.W.2d 80 (2006); *State v. Laymon*, 217 Neb. 464, 348 N.W.2d 902 (1984).

[20] See *State v. Thomas, supra* note 18.

enhancement statutes] unless the defendant was, on such prior conviction, discharged from prison, jail, probation, or parole within fifteen years of the date of the commission of the principal offense." Wabashaw argues that the South Dakota law operates as an "'expungement'" or "'pardon'" of any prior felony convictions, for enhancement purposes, 15 years after discharge.[21] Wabashaw argues that "[t]o deny South Dakota's treatment of his prior offense as 'expunged' would be denying the Full Faith and Credit of South Dakota's laws and their treatment of judgments of convictions."[22]

(a) The Plain Language of Nebraska's Habitual Criminal Statute Does Not Preclude Use of the 1977 Conviction

[15] Nebraska's habitual criminal statute does not preclude the use of Wabashaw's 1977 conviction. Nebraska's habitual criminal statute, § 29-2221, states:

> (1) Whoever has been twice convicted of a crime, sentenced, and committed to prison, in this or any other state or by the United States or once in this state and once at least in any other state or by the United States, for terms of not less than one year each shall, upon conviction of a felony committed in this state, be deemed to be an habitual criminal . . . .

The statute's plain language does not impose a time limit for using a prior conviction. Nor does it provide that an out-of-state conviction may be used only if it could be used for enhancement in that other state. The statute simply requires that the defendant was twice previously (1) convicted, (2) sentenced, and (3) committed to prison for a term not less than 1 year.

Section 29-2221 does contain one, but only one, exception to the use of a prior conviction. That exception, found in subdivision (3), provides that if the state grants a person a pardon because he is innocent, the state cannot use the conviction for enhancement. Wabashaw claims that the South Dakota statute operated as a "pardon" of his 1977 conviction and that Nebraska cannot use the conviction for enhancement. But this so-called

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[21] Brief for appellant at 36.

[22] *Id.*

"pardon" was not granted because he was innocent and therefore does not fit the exception under the Nebraska statute.

Nothing in the language of the Nebraska habitual criminal statute suggests the court erred in using Wabashaw's 1977 South Dakota conviction for enhancement purposes.

(b) The Full Faith and Credit Clause Does Not Require Nebraska to Recognize South Dakota's Treatment of the 1977 Conviction

Wabashaw argues that Nebraska must give full faith and credit to South Dakota's treatment of his conviction. We are not convinced that the Full Faith and Credit Clause of the U.S. Constitution requires Nebraska to recognize South Dakota's treatment of the 1977 conviction as "expunged" for enhancement purposes.

The New Mexico Court of Appeals faced a similar, although not identical, issue in *State v. Edmondson*.[23] In *Edmondson*, a New Mexico trial court enhanced the defendant's sentence, using a Texas conviction that had been set aside by a Texas court. The defendant argued on appeal that the Full Faith and Credit Clause prohibited use of the Texas conviction because Texas law did not permit such convictions for habitual offender sentencing. The New Mexico Court of Appeals decided that the Texas conviction could be used to enhance the defendant's sentence in New Mexico, even though it could not be used under the Texas habitual offender statute.

The court refused to apply the Full Faith and Credit Clause. It stated the clause would "rarely, if ever, compel one state to be governed by the law of a second state regarding the punishment that can be imposed for a crime committed within the first state's boundaries."[24] The court relied on *Hughes v. Fetter*.[25] In *Fetter*, the U.S. Supreme Court stated, "[F]ull faith and credit does not automatically compel a forum state to subordinate its own statutory policy to a conflicting public act of another state;

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[23] *State v. Edmondson*, 112 N.M. 654, 818 P.2d 855 (N.M. App. 1991).

[24] *Id.* at 659, 818 P.2d at 860.

[25] *Hughes v. Fetter*, 341 U.S. 609, 71 S. Ct. 980, 95 L. Ed. 1212 (1951).

rather, it is for this Court to choose in each case between the competing public policies involved."[26]

The *Edmondson* court reasoned that a state's penal code is the strongest expression of the state's public policy. It stated that "[f]ull faith and credit ordinarily should not require a state to abandon such fundamental policy in favor of the public policy of another jurisdiction."[27] The court ultimately decided that the policies behind the Texas rule precluding the use of the conviction were not so compelling that full faith and credit required the rule to prevail over New Mexico law.

[16] We find the *Edmondson* court's analysis persuasive. We conclude that the Full Faith and Credit Clause does not prevent a Nebraska court from using Wabashaw's 1977 robbery conviction. The court did not err in using Wabashaw's conviction to enhance his sentence.

5. Wabashaw's Claims of Ineffective Assistance of Counsel

[17-19] Wabashaw claims he received ineffective assistance of counsel in several respects. We need not dismiss an ineffective assistance of counsel claim merely because a defendant raises it on direct appeal.[28] The determining factor is whether the record is sufficient to adequately review the question.[29] But if the defendant has not raised ineffective assistance of counsel at the trial level and it requires an evidentiary hearing, we will not address the matter on direct appeal.[30]

[20-22] To establish a right to relief because of ineffective counsel at trial or on direct appeal, the defendant has the burden first to show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area.[31] Next, the defendant must show that counsel's deficient performance

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[26] *Id.*, 341 U.S. at 611.

[27] *State v. Edmondson, supra* note 23, 112 N.M. at 659-60, 818 P.2d at 860-61.

[28] *State v. Faust*, 265 Neb. 845, 660 N.W.2d 844 (2003).

[29] *Id.*

[30] See *id.*

[31] *Id.*

prejudiced the defense in his or her case.[32] To prove prejudice, the defendant must show that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different.[33] A reasonable probability is a probability sufficient to undermine confidence in the outcome.[34] When a defendant challenges a conviction, the question is whether there is a reasonable probability that absent the errors, the fact finder would have had a reasonable doubt concerning guilt.[35]

(a) Wabashaw Was Not Denied Effective Assistance of Counsel Because of an Alleged Conflict of Interest

Wabashaw contends that he was denied effective assistance of counsel because of an alleged conflict of interest. Before trial, Wabashaw asked his trial counsel to file a motion to withdraw and for appointment of successor counsel. Counsel had previously represented Henry in an unrelated matter, and Wabashaw believed counsel would not fully and effectively examine Henry at trial because of that relationship. The court overruled the motion. Wabashaw now argues that this alleged conflict of interest denied him effective assistance of counsel. We believe the record is sufficient to adequately review this issue on direct appeal.

[23-25] The right to effective assistance of counsel generally requires that the defendant's attorney be free from any conflict of interest.[36] The phrase "conflict of interest" denotes a situation in which a lawyer might disregard one duty for another or when a lawyer's representation of one client is rendered less effective because of his or her representation of another client.[37] A conflict of interest must be actual, rather than speculative or

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[32] *Id.*

[33] *Id.*

[34] See *id.*

[35] *Id.*

[36] U.S. Const. amend. VI; Neb. Const. art. I, § 11; *State v. Dunster*, 262 Neb. 329, 631 N.W.2d 879 (2001); *State v. Narcisse*, 260 Neb. 55, 615 N.W.2d 110 (2000).

[37] See, *State v. Dunster, supra* note 36; *State v. Narcisse, supra* note 36.

hypothetical, before a court can overturn a conviction because of ineffective assistance of counsel.[38]

[26] Wabashaw relies in part on *State v. Ehlers*.[39] In *Ehlers*, the concern was defense counsel's attorney-client relationship with a state witness. The State argued that the relationship gave rise to continuing obligations of loyalty and confidentiality that could prevent counsel from conducting a thorough cross-examination. We noted that the goal is to discover whether a defense lawyer has divided loyalties that prevent him or her from effectively representing the defendant. We stated that disqualification is appropriate when the conflict could cause the defense attorney to improperly use privileged communications in cross-examination. We also noted that disqualification is appropriate if the conflict could deter the defense attorney from intense probing on cross-examination.

At the hearing on the motion to withdraw, the State said it could not guarantee that it would not call Henry as a witness because "officers come and go from Santee" and that if Vance "moved on," it would be necessary to call Henry. Vance, however, ultimately testified for the State, and the State did not call Henry as a witness. Instead, Henry testified for the defense. Therefore, trial counsel was never in the position of cross-examining Henry, and the concern in *Ehlers* regarding counsel's inability to conduct a thorough cross-examination was not present.

Wabashaw further argues the written confession was a forgery. Therefore, he asserts that Vance and Henry's credibility was crucial. He claims that trial counsel should have established the statement's unreliability. He argues that although counsel asked Henry if he witnessed the statement, counsel failed to ask why Henry did not strike his name from the statement. Nor did counsel ask why he allowed the statement to go forward without alerting the court that his signature had been "forged."

Wabashaw has failed to show how counsel's failure to further question Henry prejudiced his defense. It is unclear how any

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[38] *Id.*

[39] *State v. Ehlers*, 262 Neb. 247, 631 N.W.2d 471 (2001).

further probing of Henry could have swayed the jury. Henry's direct testimony established that he did not sign his own name to the statement. Further questioning regarding Henry's character or his conduct would not affect the statement's veracity because it was Vance, not Henry, who questioned Wabashaw and took Wabashaw's written statement.

Wabashaw has failed to show that counsel's alleged conflict of interest prejudiced his defense. Thus, we determine that he was not denied effective assistance of counsel because of an alleged conflict of interest.

(b) Counsel's Failure to Request an Evidentiary Hearing on the Motion to Quash Was Not Ineffective Assistance

Wabashaw also argues that trial counsel was ineffective in failing to request an evidentiary hearing on Wabashaw's motion to quash. Wabashaw contends that counsel failed to preserve relevant evidence, thereby materially affecting his ability to challenge the court's denial of his motion to quash. Specifically, Wabashaw alleges that counsel failed to produce evidence showing Wabashaw is an American Indian or that he is a member of the Sioux tribe protected by the 1868 Treaty.

Counsel's failure to preserve the evidence did not prejudice Wabashaw. We have concluded that the 1868 Treaty did not provide a basis for granting the motion to quash. So, Wabashaw suffered no prejudice when counsel failed to produce evidence showing he was a member protected by the treaty. Counsel's failure to request an evidentiary hearing on the motion was not ineffective assistance of counsel.

(c) The Record on Direct Appeal Is Insufficient to Review the Remaining Ineffective Assistance Claims

Wabashaw further argues that counsel was ineffective by failing to (1) object to references to evidence recovered by the police, (2) file a motion to suppress Wabashaw's confession as fruit of the poisonous tree, (3) cross-examine Vance during the State's case in chief, and (4) obtain a forensic handwriting expert.

We conclude that the record on direct appeal is not sufficient to adequately review these claims of ineffective assistance.

V. CONCLUSION

We conclude that the district court had jurisdiction. The court did not err in (1) failing to conduct an evidentiary hearing on Wabashaw's second motion to allow counsel to withdraw, (2) determining that the State had made sufficient proof of identity to use the 1977 conviction to enhance Wabashaw's sentence, or (3) accepting the 1977 conviction for enhancement when South Dakota law precludes its use.

Assuming the court erred in failing to conduct an evidentiary hearing on Wabashaw's first motion to allow counsel to withdraw, it was not prejudicial.

Neither trial counsel's alleged conflict of interest nor his failure to request an evidentiary hearing on the motion to is insufficient to review Wabashaw's remaining ineffective assistance claims on direct appeal.

We affirm Wabashaw's convictions and sentences.

AFFIRMED.

HEAVICAN, C.J., not participating in the decision.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. JOHN C. KINNEY, RESPONDENT.

740 N.W.2d 607

Filed November 2, 2007. No. S-87-352.

1. **Disciplinary Proceedings: Appeal and Error.** In attorney discipline and admission cases, the Nebraska Supreme Court reviews recommendations de novo on the record, reaching a conclusion independent of the referee's findings; when credible evidence is in conflict on material issues of fact, however, the court considers and may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another.
2. **Disciplinary Proceedings.** The Nebraska Supreme Court owes a solemn duty to protect the public and the legal profession when considering an application for reinstatement to the practice of law.
3. ____. A mere sentimental belief that a disbarred lawyer has been punished enough will not justify his or her restoration to the practice of law. The primary concern is whether the applicant, despite the former misconduct, is now fit to be admitted to the practice of law and whether there is a reasonable basis to believe that the present fitness will permanently continue in the future.
4. ____. Reinstatement after disbarment should be difficult rather than easy.

5. **Disciplinary Proceedings: Proof.** A disbarred attorney has the burden of proof to establish good moral character to warrant reinstatement. The applicant can overcome this burden by clear and convincing evidence. The proof of good character must exceed that required under an original application for admission to the bar because it must overcome the former adverse judgment of the applicant's character.
6. ____: ____. The more egregious the misconduct, the heavier an applicant's burden to prove his or her present fitness to practice law.
7. **Disciplinary Proceedings: Attorneys at Law.** Legal professionals who are acquainted with an individual are in a unique position to assess that person's character and fitness to be a lawyer.
8. ____: ____. Besides moral reformation, an applicant for reinstatement after disbarment must also otherwise be eligible for admission to the bar as in an original application.
9. ____: ____. An applicant for reinstatement after disbarment must show that he or she is currently competent to practice law in Nebraska.

Original action. Judgment of conditional reinstatement.

Kent L. Frobish, Assistant Counsel for Discipline, for relator.

Robert F. Bartle, of Bartle & Geier Law Firm, for respondent.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

PER CURIAM.

This court disbarred John C. Kinney in May 1987 after he embezzled about $23,000 from his employer's law firm.[1] Kinney applied for reinstatement. We appointed a referee, who recommended that we readmit Kinney contingent upon Kinney's taking a course in legal ethics and successfully passing the Nebraska bar examination. Counsel for Discipline filed exceptions to the referee's recommendations.

BACKGROUND

In 1981, Kinney was admitted to the practice of law in Nebraska. Robert G. Scoville, an attorney practicing in South Sioux City, Nebraska, hired Kinney as an associate attorney and

[1] *State ex rel. NSBA v. Kinney*, 225 Neb. 340, 405 N.W.2d 17 (1987).

paid Kinney a salary. As an employee, Kinney was obligated to turn over to the law firm all fees earned and paid to him. In 1984, however, Kinney kept about $20,000 in fees that he should have turned over to the firm. When this theft came to light, Scoville confronted Kinney, but agreed to give him another chance. Scoville did not report the theft to the police, and he allowed Kinney to continue his employment as an associate. Kinney's father paid Scoville the $20,000 restitution.

According to Kinney, he had an alcohol problem when the 1984 incident occurred. Once Scoville discovered the theft, Kinney entered a 30-day inpatient treatment program. After completing the program, Kinney became involved with Alcoholics Anonymous.

In 1986, Scoville discovered that Kinney had again misappropriated funds. This time, Kinney had stolen about $23,000. Scoville fired Kinney and filed a grievance against him with the Counsel for Discipline in January 1987. Kinney admitted to the Counsel for Discipline that he had embezzled about $23,000 from Scoville. Kinney agreed to make full restitution to Scoville over time. The county attorney did not charge Kinney with a crime.

In April 1987, Kinney signed a voluntary surrender of license, admitting that he violated DR 1-102(A)(1), (4), and (6) of the Code of Professional Responsibility. In May 1987, we disbarred Kinney.[2]

Kinney applied for reinstatement of his license in December 1998. We denied his application without a hearing. In October 2006, Kinney filed the current application for reinstatement. Counsel for Discipline resisted Kinney's application. We appointed a referee to conduct an evidentiary hearing. Following the hearing, the referee recommended that we readmit Kinney to the practice of law, contingent upon Kinney's taking a course in legal ethics and successfully passing the Nebraska bar examination. Counsel for Discipline filed exceptions to the referee's recommendations.

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[2] *Id.*

ASSIGNMENTS OF ERROR

Counsel for Discipline takes exception to the referee's finding that Kinney has overcome the former adverse judgment as to his character and that he currently possesses good moral character sufficient to warrant reinstatement.

STANDARD OF REVIEW

[1] In attorney discipline and admission cases, we review recommendations de novo on the record, reaching a conclusion independent of the referee's findings.[3] When credible evidence is in conflict on material issues of fact, however, we consider and may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another.[4]

ANALYSIS

[2-4] As the court that disbarred Kinney, we have inherent power to reinstate him to the practice of law.[5] As recently noted in *State ex rel. Counsel for Dis. v. Mellor*,[6] this court owes a solemn duty to protect the public and the legal profession when considering an application for reinstatement.[7] A mere sentimental belief that a disbarred lawyer has been punished enough will not justify his or her restoration to the practice of law.[8] The primary concern is whether the applicant, despite the former misconduct, is now fit to be admitted to the practice of law. Also, we must determine whether there is a reasonable basis to believe that the present fitness will permanently continue in the future.[9] In other words, reinstatement after disbarment should be difficult rather than easy.[10]

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[3] See *State ex rel. Counsel for Dis. v. Mellor*, 271 Neb. 482, 712 N.W.2d 817 (2006).

[4] See *id.*

[5] See *id.*

[6] *Id.*

[7] See *id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*

[5,6] A disbarred attorney has the burden of proof to establish good moral character to warrant reinstatement.[11] The applicant can overcome this burden by clear and convincing evidence.[12] The proof of good character must exceed that required under an original application for admission to the bar because it must overcome the former adverse judgment of the applicant's character.[13] "It follows that '[t]he more egregious the misconduct, the heavier an applicant's burden to prove his or her present fitness to practice law.'"[14]

We disbarred Kinney in 1987 after he embezzled nearly $23,000 from his employer's law firm. This was not the first time Kinney had taken money from his employer. In 1984, he had embezzled about $20,000 in fees from the same employer. Despite the misconduct that led to Kinney's disbarment, the referee determined that Kinney had proved by clear and convincing evidence that he currently possesses good moral character that would warrant reinstatement. We agree.

After we disbarred Kinney, he sought alcohol and drug treatment. He completed a 30-day inpatient program for alcohol, drugs, and gambling, and then lived at a halfway house for an additional 90 days. Kinney also participated in Alcoholics Anonymous following his completion of these programs. Kinney testified that he has not had any alcohol or drug problems since completing rehabilitation in 1987. He explained that he might have a glass of wine occasionally when he is at dinner with friends, but that is the extent of his current alcohol consumption. He further stated that he has attended many social activities where free alcohol is provided, but has had no recurrence of his previous alcohol problems. In *Mellor*,[15] we were unable to predict whether the respondent could function as a lawyer without reverting to addictive and potentially unlawful behavior.

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[11] *Id.*

[12] Neb. Ct. R. of Discipline 10(J) and (V) (rev. 2005); *State ex rel. Counsel for Dis. v. Mellor, supra* note 3.

[13] *State ex rel. Counsel for Dis. v. Mellor, supra* note 3.

[14] *Id.* at 485, 712 N.W.2d at 820, quoting *Matter of Robbins*, 172 Ariz. 255, 836 P.2d 965 (1992).

[15] *State ex rel. Counsel for Dis. v. Mellor, supra* note 3.

Here, the record shows that Kinney is effectively addressing his drug and alcohol problems.

In addition, Kinney has paid restitution to Scoville. According to Kinney, by 1995, he had already paid Scoville an amount "in the high teens or low 20s." He settled his remaining restitution with a $2,000 lump-sum payment to Scoville's estate in 1995.

One concern Counsel for Discipline raised was that Kinney had filed for bankruptcy in 1995. Counsel for Discipline argues that although Kinney made restitution to Scoville and his estate, Kinney discharged about $30,000 owed to other creditors. We determine, however, that Kinney had a right to seek relief under the bankruptcy laws just as any other citizen would. We will not penalize him for exercising this right under these circumstances.

Kinney also presented extensive evidence regarding his work history following his disbarment. In 1988, Kinney moved to Kansas City, Missouri. There he worked as a contract administrator for a geotechnical environmental engineering firm. After leaving the engineering firm in April 2001, Kinney did legal research as an independent contractor for a staff attorney at another company. In 2005, Kinney began working with the staff attorney as a legal assistant 3 days per week. His duties included conducting legal research and preparing witnesses and exhibits. The record concerning Kinney's work history reflects that Kinney was a responsible and trusted employee.

Kinney has been involved with many charitable organizations in the Kansas City area. These organizations include the EVE project (Elders Volunteering for Elders), where he has served as a volunteer, board member, and board chairman; the First Step Fund, where as a volunteer, he would help review leases and offer business assistance; Operation Breakthrough; Friendship House; Shepherd's Center; and the Cleaver YMCA project.

At the hearing, two persons testified for Kinney. When asked his opinion about Kinney's reputation for honesty and integrity, one responded, "I believe [Kinney is] a trustworthy and dedicated individual that has used the last 20 years to his great credit to benefit those around him." The other individual, a lawyer, described Kinney as "trustworthy" and "honest."

[7] Besides this testimony, Kinney offered 11 letters supporting his reinstatement, including letters from his wife, friends, supervisors, and other professional and community acquaintances. Unlike *Mellor*, where the record contained no testimony or written support from lawyers or judges regarding the respondent's character and fitness to practice law, two lawyers wrote letters supporting Kinney. As we noted in *Mellor*, legal professionals who are acquainted with an individual are in a unique position to assess that person's character and fitness to be a lawyer.[16] The lawyers writing for Kinney were aware of Kinney's past, and yet they fully supported his reinstatement. We have placed considerable weight on such evidence in deciding whether a disbarred lawyer has met the burden of showing rehabilitation sufficient to warrant reinstatement.[17]

The referee found Kinney's testimony to be "honest, forthright and compelling." The record reflects that Kinney takes full responsibility for his past mistakes. We determine that given his successful rehabilitation, restitution payments, responsible work history, and volunteer service, Kinney has taken positive steps over the last 20 years to turn his life around. We conclude that Kinney has met his burden of establishing good moral character to warrant reinstatement.

[8,9] Besides moral reformation, an applicant for reinstatement after disbarment must also otherwise be eligible for admission to the bar as in an original application.[18] The applicant must show that he or she is currently competent to practice law in Nebraska.[19]

Although Kinney has engaged in law-related employment, he has not practiced law in the last 20 years. He testified that he attended continuing education programs through his employment. These included seminars on contracts, insurance, and loss prevention. The only actual continuing legal education he has had, however, was a 3-hour ethics seminar put on by the

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[16] *State ex rel. Counsel for Dis. v. Mellor, supra* note 3.

[17] *Id.*

[18] *Id.*

[19] See *id.*

Missouri Bar Association in October 2006. Therefore, we agree with the referee's recommendation that Kinney's readmission to practice law should be contingent upon his successfully passing the Nebraska bar examination.

CONCLUSION

We conclude that Kinney has met his burden of showing by clear and convincing evidence that if he passes the Nebraska bar examination, his license to practice law in Nebraska should be reinstated. His application is conditionally granted. Costs taxed to respondent.

JUDGMENT OF CONDITIONAL REINSTATEMENT.

STATE OF NEBRASKA, APPELLEE, V.
JOSEPH EDGAR WHITE, APPELLANT.
740 N.W.2d 801

Filed November 2, 2007. No. S-06-919.

1. **DNA Testing: Appeal and Error.** A motion for DNA testing is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed.

Appeal from the District Court for Jefferson County: VICKY L. JOHNSON, Judge. Reversed and remanded for further proceedings.

Douglas J. Stratton, of Stratton & Kube, P.C., for appellant.

Jon Bruning, Attorney General, and James D. Smith for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MILLER-LERMAN, J.

NATURE OF CASE

Joseph Edgar White appeals the order of the district court for Jefferson County which denied White's motion for DNA testing filed under the DNA Testing Act, Neb. Rev. Stat. §§ 29-4116 through 29-4125 (Cum. Supp. 2006). The district

court determined that testing would not result in noncumulative, exculpatory evidence and denied DNA testing. We conclude that the district court erred in such determination, and we therefore reverse the denial and remand for further proceedings.

STATEMENT OF FACTS

Following a jury trial, White was convicted of first degree felony murder in connection with the death of 68-year-old Helen Wilson. White was sentenced to life imprisonment. White's conviction and sentence were affirmed on appeal to this court. *State v. White*, 239 Neb. 554, 477 N.W.2d 24 (1991). The facts of the case were described in this court's opinion as follows:

> The record shows that on the night of February 5, 1985, White, James Dean, Thomas Winslow, Ada JoAnn Taylor, and Debra Shelden forcibly entered the victim's apartment in Beatrice[, Nebraska,] for the purpose of robbing her. A sixth accomplice, Kathy Gonzalez, entered the apartment during the course of the robbery. The record shows that White participated in at least four planning sessions concerning this incident. During those discussions, White proposed sexually assaulting Mrs. Wilson as well as robbing her.
>
> Most of the details of the Wilson homicide are set out in *State v. Dean*, 237 Neb. 65, 464 N.W.2d 782 (1991). Specifically, Mrs. Wilson was forced into her bedroom and was threatened and physically abused when she refused to tell the intruders where she kept her money. She was then forced back to the living room, screaming and kicking, and either tripped or was pushed to the floor. At this point, White and Winslow took turns sexually assaulting Mrs. Wilson. According to Taylor, White had vaginal intercourse with the victim, saying that she "deserved it," while Winslow held the victim's legs. Winslow then sodomized the victim while White held her down. Meanwhile, Taylor suffocated Mrs. Wilson with a pillow.
>
> Mrs. Wilson did not move after she was raped, and appeared to be either dead or near death. The intruders proceeded to search the apartment for money. Taylor went into the kitchen and made some coffee for White and

> Winslow. Dean testified that after they left the apartment building, there was a general conversation between Taylor and White "about how nice it was to do it. They would do it again. It was fun. If they had the opportunity, they would do it again." White, Taylor, Winslow, and Dean then went to a truckstop and had breakfast.
>
> When Mrs. Wilson's body was found the next morning by her brother-in-law, she had a complete fracture through the lower part of the left humerus, fractured ribs, a fractured sternum, a 2-centimeter vaginal tear, and numerous bruises, abrasions, and scratches. Her hands were loosely tied with a towel, and a scarf was tightly wrapped around her head and tied.

239 Neb. at 555-56, 477 N.W.2d at 24-25.

On October 26, 2005, White filed a motion for DNA testing under the DNA Testing Act. White sought DNA testing of "any biological material that is related to the investigation or prosecution" that had resulted in the judgment against him. A hearing on the motion was held April 7, 2006. On August 2, the district court entered an order denying White's motion.

In its order denying White's motion, the court noted various facts that it found relevant to its decision. In addition to the prosecution of White, the court noted that the State filed charges against James Dean, Thomas Winslow, Ada JoAnn Taylor, Debra Shelden, and Kathy Gonzalez in connection with Wilson's death. Dean, Taylor, and Shelden pled guilty to aiding and abetting second degree murder, and Gonzalez pled guilty to second degree murder. Dean, Taylor, Shelden, and Gonzalez all testified against White at his trial. Winslow did not testify against White, but Winslow pled no contest to aiding and abetting second degree murder. At White's trial, Dean, Taylor, and Shelden all testified that they saw White and Winslow sexually assault Wilson. Gonzalez testified that White was at the scene of the crime. A pathologist testified at trial that Wilson had suffered vaginal injuries and that her vagina and rectum had been penetrated. Samples of semen that were found "on the scene" were subjected to forensic testing, and one sample was found to be similar to Winslow's blood type, but no forensic testing indicated that any sample belonged to White. White

testified in his own defense and denied that he was present at Wilson's death.

In the August 2, 2006, order, the court first determined that DNA testing was effectively not available at the time of White's trial. The court did not determine but assumed for purposes of analysis that biological material had been retained under circumstances likely to safeguard the integrity of its original physical composition. Finally, the court determined that DNA testing would not result in noncumulative, exculpatory evidence relevant to any claim that White was wrongfully convicted or sentenced. The court therefore denied White's motion for DNA testing.

White appeals the denial of his motion for DNA testing.

ASSIGNMENT OF ERROR

White asserts that the district court erred in denying his motion for DNA testing and particularly in finding that DNA testing would not result in noncumulative, exculpatory evidence.

STANDARD OF REVIEW

[1] A motion for DNA testing is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed. *State v. Phelps*, 273 Neb. 36, 727 N.W.2d 224 (2007).

ANALYSIS

We recently set forth the procedure for obtaining DNA testing pursuant to the DNA Testing Act as follows:

> A person in custody takes the first step toward obtaining possible relief under the DNA Testing Act by filing a motion requesting forensic DNA testing of biological material. See § 29-4120(1). Forensic DNA testing is available for any biological material that (1) is related to the investigation or prosecution that resulted in the judgment, (2) is in the actual or constructive possession of the State or others likely to safeguard the integrity of the biological material, and (3) either was not previously subjected to DNA testing or can be retested with more accurate current techniques. See *id*. After a motion seeking forensic DNA testing has been filed, the State is required

> to file an inventory of all evidence that was secured by the State or a political subdivision in connection with the case. See § 29-4120(4).
>
> If the threshold requirements of § 29-4120(1) have been met, then a court is required to order testing only upon a further determination that "such testing was effectively not available at the time of trial, that the biological material has been retained under circumstances likely to safeguard the integrity of its original physical composition, and that such testing may produce noncumulative, exculpatory evidence relevant to the claim that the person was wrongfully convicted or sentenced." § 29-4120(5).

State v. Phelps, 273 Neb. at 40, 727 N.W.2d at 227-28.

In its order in the present case, the district court implicitly found that the threshold requirements of § 29-4120(1) paraphrased above were met. The court then considered whether the three requirements listed in § 29-4120(5) and quoted above were met. It first found that DNA testing was not available at the time of White's trial. The State does not challenge this finding. Because the court would ultimately deny White's motion based on the third requirement, the court assumed for purposes of analysis of the second requirement that the biological material had been retained under circumstances likely to safeguard the integrity of its original physical composition. The court thereafter determined that DNA testing would not produce noncumulative, exculpatory evidence relevant to the claim that White was wrongfully convicted or sentenced, and the court therefore denied White's motion. The court's determination on the final requirement is challenged on appeal.

The district court characterized White's argument with regard to wrongful conviction and sentence as a claim by White that with the aid of DNA testing, he could establish that he was not present and did not participate in the crime. The court determined that even if DNA testing indicated that the biological samples did not belong to White, such evidence would not compel the conclusion that White was not present. The court further noted that White was not charged with sexually assaulting Wilson but with felony murder, which could have been proved based on White's participation in the felony robbery even if he

did not participate in a sexual assault. The court noted that even without biological evidence, there was other evidence, mainly witness testimony, that White was present at Wilson's death and that he participated in the sexual assault. Thus, even if DNA testing proved that the semen belonged to Winslow and not to White, such evidence would merely be an additional piece of evidence to be considered by a jury and would not preclude a jury from finding White guilty of first degree murder based on other evidence. In this respect, the court noted that White was convicted in the original trial despite testimony that biological evidence found at the scene could not be tied to him. The court therefore concluded that even if DNA testing were favorable to White, "the result would be at best inconclusive, and certainly not exculpatory," and that such DNA evidence "would be, at best, cumulative of the other biological evidence." Finally, the district court noted that the court that had sentenced White had "found that there was little appreciable difference in the degree of culpability between" White and his codefendants, and the district court in the present case therefore concluded that DNA evidence favorable to White would not have affected his sentence.

White argues on appeal that the district court's analysis was limited to a consideration of the possible results of DNA testing as being that the samples belonged to Winslow or to White or to both, with the most favorable result to White being that the samples belonged only to Winslow. White asserts that the district court failed to consider the possibility that DNA testing would exclude both White and Winslow as contributors to the samples. White argues that such result would be the most favorable to him because it would call into question the testimony of the State's witnesses against him and would be consistent with his defense that he was not present at the scene of the crime.

Three witnesses testified that *only* White and Winslow carried out the sexual assault of Wilson. If DNA testing excluded White and Winslow, then, White argues, the sample necessarily belongs to another person, possibly Dean or some other unidentified male. A result showing that neither White nor Winslow contributed to the sample would raise serious doubts as to the credibility of the witnesses who stated that only White and

Winslow carried out the sexual assault. Such evidence could be used by the defense to cross-examine the witnesses and undermine their testimony regarding the sexual assault and the murder which, White argues, would be "devastating" to the prosecution's case. Brief for appellant at 17.

The heart of the State's case was the testimony of White's codefendants, Dean, Taylor, and Shelden, who each testified that they saw only White and Winslow sexually assault Wilson. We agree with White that if DNA testing showed that the semen samples belonged to neither White nor Winslow, such evidence would raise questions regarding the identity of the person or persons who actually contributed to the sample and who presumably committed the assault. Such a favorable test result could cause jurors to question the credibility of Dean, Taylor, and Shelden. Evidence that contradicted such witnesses' testimony that White and Winslow carried out the sexual assault could cause jurors to question their testimony regarding other matters. Evidence that raised serious doubts regarding the credibility of these witnesses would be favorable to White and material to the issue of his guilt and, therefore, "exculpatory" as defined under the DNA Testing Act.

We determine that a DNA test result that excluded both White and Winslow as contributors to the semen samples would be exculpatory under the DNA Testing Act's unique definition of "exculpatory evidence." The DNA Testing Act defines "exculpatory evidence" as evidence "which is favorable to the person in custody and material to the issue of the guilt of the person in custody." § 29-4119. As noted above, DNA test results that excluded both White and Winslow could raise serious doubts regarding the testimony of the main witnesses against White. Although there was other evidence regarding White's presence at the crime scene and his involvement in planning the crime, the testimonies of Dean, Taylor, and Shelden were critical to the State's case against White resulting in White's conviction for first degree murder.

For the sake of completeness, we note that in addition to finding that DNA testing would not produce exculpatory evidence, the district court found that DNA evidence excluding White as a contributor would be cumulative to forensic

evidence presented at White's trial, which failed to indicate that the semen samples belonged to White. The State argues that White was convicted despite the lack of such forensic evidence and that DNA evidence excluding White would thus be cumulative of such evidence. However, we note that there is a difference between forensic evidence that fails to identify a person and DNA evidence that excludes the person. See *State v. Houser*, 241 Neb. 525, 490 N.W.2d 168 (1992) (noting probative value of DNA evidence). If DNA testing results specifically exclude White as a contributor, such evidence would not be merely cumulative of the forensic evidence, which simply failed to identify White.

Because DNA testing could result in evidence excluding both White and Winslow as contributors to the semen samples, we determine that DNA testing may produce noncumulative, exculpatory evidence relevant to the claim that White was wrongfully convicted or sentenced and that the district court erred when it failed to so determine. The district court therefore abused its discretion when it denied White's motion for DNA testing.

We note that in its order denying DNA testing, the district court, for purposes of analysis, assumed without deciding that biological material had been retained under circumstances likely to safeguard the integrity of its original physical composition. Because the court denied White's motion for DNA testing for other reasons, the court did not make a determination on the retention issue. In appellate proceedings, the examination by the appellate court is confined to questions which have been determined by the trial court. *State v. Poe*, 266 Neb. 437, 665 N.W.2d 654 (2003). Without a determination of this issue, we cannot order the district court to order DNA testing. We therefore remand the cause to the district court with orders to determine whether biological material has been retained under circumstances likely to safeguard the integrity of its original physical composition. If the court so finds, it should order DNA testing of such material.

CONCLUSION

We conclude that the district court erred in its determination that DNA testing would not produce noncumulative, exculpatory

evidence and that the court therefore abused its discretion when it denied White's motion for DNA testing. We reverse the denial and remand the cause to the district court for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, V.
THOMAS W. WINSLOW, APPELLANT.
740 N.W.2d 794

Filed November 2, 2007. No. S-06-983.

1. **Statutes: Appeal and Error.** The interpretation of a statute is a question of law for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
2. **DNA Testing: Appeal and Error.** A motion for DNA testing is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed.
3. **DNA Testing: Pleas.** The DNA Testing Act does not exclude persons who were convicted and sentenced pursuant to pleas.

Appeal from the District Court for Gage County: VICKY L. JOHNSON, Judge. Reversed and remanded for further proceedings.

James R. Mowbray and Jerry L. Soucie, of Nebraska Commission on Public Advocacy, for appellant.

Jon Bruning, Attorney General, and James D. Smith for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MILLER-LERMAN, J.

NATURE OF CASE

Thomas W. Winslow appeals the order of the district court for Gage County which denied Winslow's motion for DNA testing filed under the DNA Testing Act, Neb. Rev. Stat. §§ 29-4116 through 29-4125 (Cum. Supp. 2006). The district

court determined that Winslow was not eligible for DNA testing because he was convicted based on his plea of no contest. As an alternate ground for denying the motion, the district court determined that DNA testing would not result in noncumulative, exculpatory evidence. We conclude that the district court erred in both determinations, and we therefore reverse, and remand for further proceedings.

STATEMENT OF FACTS

On April 24, 1989, Winslow was charged with first degree murder in connection with the death of 68-year-old Helen Wilson. After a codefendant, Joseph Edgar White, was convicted by a jury of first degree murder, Winslow reached a plea agreement with the State, and on December 8, 1989, Winslow pled no contest to a reduced charge of aiding and abetting second degree murder. As a factual basis in support of Winslow's plea, the State relied on the evidence and testimony of witnesses presented at White's trial. The trial court accepted Winslow's plea, and Winslow was sentenced to imprisonment for 50 years. Winslow's sentence was summarily affirmed by this court. *State v. Winslow*, 236 Neb. xxvii (No. S-90-193, Jan. 4, 1991).

The facts of the underlying crime were described in this court's opinion in codefendant White's appeal as follows:

> The record shows that on the night of February 5, 1985, White, James Dean, Thomas Winslow, Ada JoAnn Taylor, and Debra Shelden forcibly entered the victim's apartment in Beatrice[, Nebraska,] for the purpose of robbing her. A sixth accomplice, Kathy Gonzalez, entered the apartment during the course of the robbery. The record shows that White participated in at least four planning sessions concerning this incident. During those discussions, White proposed sexually assaulting Mrs. Wilson as well as robbing her.
>
> Most of the details of the Wilson homicide are set out in *State v. Dean*, 237 Neb. 65, 464 N.W.2d 782 (1991). Specifically, Mrs. Wilson was forced into her bedroom and was threatened and physically abused when she refused to tell the intruders where she kept her money. She was

then forced back to the living room, screaming and kicking, and either tripped or was pushed to the floor. At this point, White and Winslow took turns sexually assaulting Mrs. Wilson. According to Taylor, White had vaginal intercourse with the victim, saying that she "deserved it," while Winslow held the victim's legs. Winslow then sodomized the victim while White held her down. Meanwhile, Taylor suffocated Mrs. Wilson with a pillow.

Mrs. Wilson did not move after she was raped, and appeared to be either dead or near death. The intruders proceeded to search the apartment for money. Taylor went into the kitchen and made some coffee for White and Winslow. Dean testified that after they left the apartment building, there was a general conversation between Taylor and White "about how nice it was to do it. They would do it again. It was fun. If they had the opportunity, they would do it again." White, Taylor, Winslow, and Dean then went to a truckstop and had breakfast.

When Mrs. Wilson's body was found the next morning by her brother-in-law, she had a complete fracture through the lower part of the left humerus, fractured ribs, a fractured sternum, a 2-centimeter vaginal tear, and numerous bruises, abrasions, and scratches. Her hands were loosely tied with a towel, and a scarf was tightly wrapped around her head and tied.

State v. White, 239 Neb. 554, 555-56, 477 N.W.2d 24, 24-25 (1991).

On February 22, 2006, Winslow filed a motion for DNA testing under the DNA Testing Act. Winslow sought DNA testing of "any biological material that is related to the investigation or prosecution" that resulted in the judgment against him. Hearings on the motion were held April 7 and 18. On August 29, the district court entered an order denying Winslow's motion.

In the order, the court noted various facts related to Winslow's case that it found relevant to its decision. In addition to the prosecutions of Winslow and White, the court noted that the State filed charges against James Dean, Ada JoAnn Taylor, Debra Shelden, and Kathy Gonzalez in connection with Wilson's death. Dean, Taylor, and Shelden pled guilty to aiding and abetting

second degree murder, and Gonzalez pled guilty to second degree murder. Dean, Taylor, Shelden, and Gonzalez all testified against White at his trial. Winslow did not testify against White. At White's trial, Dean, Taylor, and Shelden all testified that they saw White and Winslow, and only White and Winslow, sexually assault Wilson. Gonzalez testified that White was at the scene of the crime. A pathologist testified at White's trial that Wilson had suffered vaginal injuries and that her vagina and rectum had been penetrated. Samples of semen that were found "on the scene" were subjected to forensic testing, and one sample was found to be similar to Winslow's blood type, but no forensic testing indicated that any sample belonged to White.

In its August 29, 2006, order, the district court first addressed the State's argument that Winslow waived his right to DNA testing because he pled no contest rather than being convicted after a trial. The court noted that ordinarily, the voluntary entry of a guilty plea or a plea of no contest waives every defense to a charge, whether the defense is procedural, statutory, or constitutional. Based on this principle, the court concluded that Winslow had waived his right to DNA testing because of his plea of no contest.

In the event it was incorrect in its conclusion that Winslow waived his right to DNA testing, the district court considered Winslow's motion on its merits. The court first determined that DNA testing was effectively not available at the time of Winslow's prosecution. The court did not determine but assumed for purposes of analysis that biological material had been retained under circumstances likely to safeguard the integrity of its original physical composition. Finally, the court determined that DNA testing would not result in noncumulative, exculpatory evidence relevant to any claim that Winslow was wrongfully convicted or sentenced.

Regarding wrongful conviction, the court characterized Winslow's objective of testing as a claim by Winslow that with the aid of DNA testing, he could establish that he was not present and, therefore, did not participate in the crime of which he stood convicted. The court determined that even if DNA testing indicated that the biological samples did not belong to Winslow, such evidence would not compel a conclusion that

Winslow was not present or did not aid and abet the murder. The court noted that even without biological evidence, there was other evidence, mainly witness testimony from White's trial, that Winslow was present at Wilson's death and that he participated in the sexual assault and robbery. Thus, even if DNA testing proved that the semen belonged to White and not to Winslow, such evidence would merely be an additional piece of evidence to be considered by a jury and would not preclude a jury from finding Winslow guilty of aiding and abetting second degree murder based on other evidence. The court therefore concluded that even if DNA testing were favorable to Winslow, "the result would be at best inconclusive, and certainly not exculpatory." Because the court found that DNA testing would not result in noncumulative, exculpatory evidence, the court denied Winslow's motion for DNA testing. Finally, the district court noted that the court that had sentenced Winslow relied on Winslow's significant prior criminal record, his psychiatric records, the plea agreement, and Winslow's failure to testify against White in setting Winslow's sentence. The court in the present case therefore concluded that DNA evidence favorable to Winslow would not have changed his sentence.

Winslow appeals the denial of his motion for DNA testing.

ASSIGNMENTS OF ERROR

Winslow asserts that the district court erred in denying his motion for DNA testing and particularly in (1) concluding that his entry of a plea of no contest waived his right to DNA testing and (2) finding that DNA testing would not result in noncumulative, exculpatory evidence.

STANDARDS OF REVIEW

[1] The interpretation of a statute is a question of law for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *Neiman v. Tri R Angus, ante* p. 252, 739 N.W.2d 182 (2007).

[2] A motion for DNA testing is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed. *State v. Phelps*, 273 Neb. 36, 727 N.W.2d 224 (2007).

ANALYSIS

DNA Testing Act Allows Testing in Connection With Plea-Based Convictions.

The district court denied Winslow's motion for DNA testing on the basis that Winslow waived his right to DNA testing because he pled no contest rather than being convicted after a trial. Contrary to the district court's reasoning, we conclude as a matter of law that under the DNA Testing Act, a defendant who was convicted based on a plea is eligible for testing, and that a defendant does not waive such rights if his or her conviction was based on a plea.

The district court reasoned that a defendant who pleads waives relief under the DNA Testing Act because normally a plea waives all defenses to a criminal charge and, therefore, the defendant has already waived any defense that may be supported by DNA testing results. Initially, we note that the entry of a plea does not invariably waive all forms of relief pertaining to a plea-based conviction. Thus, for example, we have stated that a court will consider an allegation that the plea and associated conviction were the result of ineffective assistance of counsel brought under the postconviction act, Neb. Rev. Stat. §§ 29-3001 to 29-3004 (Reissue 1995). *State v. Barnes*, 272 Neb. 749, 724 N.W.2d 807 (2006). Further, the court's analysis did not focus on the specific language pertaining to the relief available under the DNA Testing Act, which we believe controls our analysis. The district court's reasoning ignores the fact that under the DNA Testing Act, a court is required to order DNA testing if, among other requirements, the court determines that such testing may produce evidence "relevant to the claim that the person was wrongfully convicted *or sentenced*." § 29-4120(5) (emphasis supplied). With respect to the impact the results of DNA testing might have on a sentence, we note that we customarily consider challenges to sentences in plea-based convictions. See *State v. Burkhardt*, 258 Neb. 1050, 607 N.W.2d 512 (2000) (guilty plea waived right to challenge factual basis for conviction, but this court considered challenge to sentence). Because DNA testing results may be used to support a claim that the person was wrongfully sentenced, it does not follow that a person who was convicted

based on a plea has waived his or her rights to relief under the DNA Testing Act.

More importantly, contrary to the reasoning of the district court, the language of the DNA Testing Act does not limit the scope of its relief to persons convicted following a trial. In this regard, we note that § 29-4120(1) of the DNA Testing Act provides, "Notwithstanding any other provision of law, a person in custody pursuant to the judgment of a court may, at any time after conviction, file a motion, with or without supporting affidavits, in the court that entered the judgment requesting forensic DNA testing . . . ." The language of the DNA Testing Act affords relief to persons "in custody pursuant to the judgment of a court," and such persons may include those in custody pursuant to either a conviction following trial or a plea-based conviction.

The language of Nebraska's DNA Testing Act may be contrasted to the language of DNA testing statutes in other states where courts have determined, based on the specific language of their relevant DNA testing statutes, that relief pursuant to such statutes is limited to defendants who were found guilty following trial and testing is not available to defendants convicted pursuant to a plea. In *People v. Byrdsong*, 33 A.D.3d 175, 180, 820 N.Y.S.2d 296, 299 (2006), the court noted that New York's statute referred a number of times to "'trial resulting in the judgment.'" Based on such language, the court concluded that "the New York State statute explicitly requires conviction by verdict and judgment after trial" and that therefore, a defendant who pled guilty was not entitled to relief under the New York statute. *Id.* See, also, *Stewart v. State*, 840 So. 2d 438 (Fla. App. 2003) (stating that Florida DNA testing statute referring to defendant who "'has been *tried* and found guilty'" excludes defendant who pled guilty or nolo contendere) (abrogated by amendment of statute as recognized in *Lindsey v. State*, 936 So. 2d 1213 (Fla. App. 2006)); *People v. Lamming*, 358 Ill. App. 3d 1153, 1155, 833 N.E.2d 925, 927, 295 Ill. Dec. 719, 721 (2005) (stating that Illinois DNA testing statute requiring that "identity was at issue at his trial" excludes defendant who pled guilty). We recognize that Nebraska's DNA Testing Act contains a reference to

"trial" in that an order for DNA testing requires, inter alia, "a determination that such testing was effectively not available at the time of trial." § 29-4120(5). However, reading Nebraska's DNA Testing Act as a whole, we do not read this reference to limit the scope of the relief granted under the DNA Testing Act to persons convicted after a trial. See *Weeks v. State*, 140 S.W.3d 39 (Mo. 2004) (stating that despite some references to "time of trial," Missouri DNA testing statute, when read as a whole, applied both to those convicted after plea and to those convicted after trial).

Nebraska's DNA Testing Act applies to "a person in custody pursuant to the judgment of a court," § 29-4120(1), and is more similar to the language of the Kansas statute at issue in *State v. Smith*, 34 Kan. App. 2d 368, 119 P.3d 679 (2005). The Kansas statute referred to "'a person in state custody, at any time after conviction.'" *Id.* at 370, 119 P.3d at 682. The Kansas court noted that the "statute itself fails to restrict its ambit based upon the plea entered by the defendant" and concluded that it would be inconsistent with the statute if DNA testing were denied solely because the conviction was the result of a guilty plea. *Id.* at 371, 119 P.3d at 683. The Kansas court stated, "The legislature is perfectly capable of limiting such postconviction relief to those who pled not guilty or no contest to the material charges, and no such limitation appears in the text of the statute." *Id.*

[3] Nebraska's DNA Testing Act, read as a whole, does not limit its application to those who were convicted following a trial. The Legislature expressed a broad intent that "wrongfully convicted persons have an opportunity to establish their innocence through [DNA] testing," § 29-4117, and that the court shall order DNA testing upon a showing that the biological material may be "relevant to the claim that the person was wrongfully convicted or sentenced," § 29-4120(5). Based on such intent and the language of the DNA Testing Act, we conclude that the DNA Testing Act does not exclude persons who were convicted and sentenced pursuant to pleas. The district court in this case therefore erred in concluding that because of his plea, Winslow was not entitled to relief under the DNA Testing Act.

DNA Testing May Produce Noncumulative, Exculpatory Evidence.

In the event it was incorrect in its conclusion that Winslow waived his right to DNA testing, the district court considered the merits of Winslow's motion. Winslow asserts on appeal that the court erred in its determination that testing would not produce noncumulative, exculpatory evidence. We agree with Winslow and conclude that the court erred in such determination.

We recently set forth the procedure for obtaining DNA testing pursuant to the DNA Testing Act as follows:

> A person in custody takes the first step toward obtaining possible relief under the DNA Testing Act by filing a motion requesting forensic DNA testing of biological material. See § 29-4120(1). Forensic DNA testing is available for any biological material that (1) is related to the investigation or prosecution that resulted in the judgment, (2) is in the actual or constructive possession of the State or others likely to safeguard the integrity of the biological material, and (3) either was not previously subjected to DNA testing or can be retested with more accurate current techniques. See *id*. After a motion seeking forensic DNA testing has been filed, the State is required to file an inventory of all evidence that was secured by the State or a political subdivision in connection with the case. See § 29-4120(4).
>
> If the threshold requirements of § 29-4120(1) have been met, then a court is required to order testing only upon a further determination that "such testing was effectively not available at the time of trial, that the biological material has been retained under circumstances likely to safeguard the integrity of its original physical composition, and that such testing may produce noncumulative, exculpatory evidence relevant to the claim that the person was wrongfully convicted or sentenced." § 29-4120(5).

State v. Phelps, 273 Neb. 36, 40, 727 N.W.2d 224, 227-28 (2007).

We note that as a factual basis in support of Winslow's plea, the State relied on the evidence and testimony of witnesses at the trial of Winslow's codefendant, White. Around the time

Winslow filed his motion for DNA testing, White also filed a motion for DNA testing. White's motion was also denied. The appeals of Winslow's and White's motions for DNA testing were consolidated for briefing and oral argument before this court.

In White's appeal, we concluded that the district court erred in its determination that DNA testing would not result in noncumulative, exculpatory evidence. We adopt the reasoning and conclusion in *State v. White, ante* p. 419, 740 N.W.2d 801 (2007), in the present case. We noted in *State v. White, supra*, that DNA testing could exclude both White and Winslow as contributors to the semen samples collected at the scene of the crime, and we determined that such DNA test result would be "exculpatory evidence" under the unique definition of "exculpatory" in Nebraska's DNA Testing Act. Section 29-4119 defines exculpatory evidence as follows: "For purposes of the DNA Testing Act, exculpatory evidence means evidence which is favorable to the person in custody and material to the issue of the guilt of the person in custody." In *State v. White*, we noted that if White and Winslow were excluded as contributing to the semen sample, such evidence would be favorable to White and material to the issue of White's guilt, because it would undermine the credibility of witnesses against White who testified that *only* White and Winslow had sexually assaulted Wilson. We therefore reversed the denial of White's motion for DNA testing and remanded the cause to the district court with directions.

We similarly conclude that the court in the present case erred in determining that DNA testing could not result in noncumulative, exculpatory evidence relevant to the claim that Winslow was wrongfully convicted or sentenced. As in *State v. White, supra*, DNA testing could exclude White and Winslow as contributors to the semen sample. Because the factual basis for Winslow's plea consisted of the evidence and testimony from White's trial, the potential test results that would be noncumulative, exculpatory evidence in White's case would also be noncumulative, exculpatory evidence in Winslow's case. Such evidence could raise doubts regarding the veracity of the testimony at White's trial that served as the factual basis for Winslow's plea and would therefore be favorable to Winslow and relevant to his claim of wrongful conviction. Evidence raising serious doubt

regarding such testimony could also be favorable to Winslow and relevant to a claim that he was wrongfully sentenced. That is, even if Winslow were placed at the scene of the crime, such evidence excluding Winslow as a contributor would also be relevant to a claim by Winslow that he was less culpable than the sentencing court had believed him to be and that therefore, he was wrongfully sentenced.

We conclude that the district court erred in concluding that DNA testing would not result in noncumulative, exculpatory evidence and that therefore, the district court abused its discretion when it denied Winslow's motion for DNA testing on such basis. Similar to the situation in *State v. White, supra*, the court assumed for purposes of analysis, but did not decide, that biological material had been retained under circumstances likely to safeguard the integrity of its original physical composition. We therefore remand the cause to the district court to make a finding on the retention issue and, if proper circumstances exist, to order DNA testing of such material.

CONCLUSION

We conclude that under the DNA Testing Act, relief is available to defendants whether they were convicted following trial or convicted based on a plea. The district court therefore erred in concluding that because Winslow pled no contest, he waived his rights under the DNA Testing Act. The court also erred in determining that DNA testing would not produce noncumulative, exculpatory evidence. The court abused its discretion when it denied Winslow's motion for DNA testing. We reverse the denial and remand the cause for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

CONNIE REIMERS-HILD, APPELLANT, V. STATE OF NEBRASKA ET AL., APPELLEES.

741 N.W.2d 155

Filed November 9, 2007. No. S-06-203.

1. **Statutes: Judgments: Appeal and Error.** The meaning of a statute is a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
2. **Limitations of Actions: Insurance: Motor Vehicles.** Neb. Rev. Stat. § 44-6413(1)(e) (Reissue 2004) bars as untimely an insured's claim for uninsured or underinsured motorist benefits when the statute of limitations on the underlying claim against the uninsured or underinsured motorist has expired.
3. **Limitations of Actions: Insurance: Motor Vehicles: Tort-feasors.** The purpose underlying Neb. Rev. Stat. § 44-6413(1)(e) (Reissue 2004) is the protection of the insurer when it may have to pay uninsured or underinsured motorist benefits. The statute makes it the responsibility of the insured to preserve the claim against the tort-feasor in order to protect the insurer's rights against the tort-feasor.
4. **Limitations of Actions: Insurance: Motor Vehicles.** Neb. Rev. Stat. § 44-6413(1)(e) (Reissue 2004) does not apply if an insured timely files a claim against an uninsured or underinsured motorist, because the statute of limitations on the insured's claim against the uninsured or underinsured motorist never expired.
5. **Time: Words and Phrases.** The word "expire," as a legal term, is generally understood to refer to a natural conclusion brought about by the passage of time, not a premature termination effected by some other cause.
6. **Limitations of Actions: Insurance: Motor Vehicles.** Neb. Rev. Stat. § 44-6413(1)(e) (Reissue 2004) does not apply when an insured has settled his or her claim against an uninsured or underinsured motorist before the statute of limitations applicable to that claim would have expired.
7. **Appeal and Error.** An appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Reversed and remanded for further proceedings.

Clarence E. Mock III and Denise E. Frost, of Johnson & Mock, for appellant.

Ralph A. Froehlich, Jay L. Welch, and Adam R. White, Senior Certified Law Student, of Locher, Pavelka, Dostal, Braddy & Hammes, L.L.C., for appellees.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, MCCORMACK, and MILLER-LERMAN, JJ.

GERRARD, J.

The coverage required by Nebraska's Uninsured and Underinsured Motorist Insurance Coverage Act[1] does not apply to "[b]odily injury, sickness, disease, or death of the insured with respect to which the applicable statute of limitations has expired on the insured's claim against the uninsured or underinsured motorist."[2] The question presented in this case is whether a statute of limitations can be said to "expire" if the insured settles his or her claim against the alleged tort-feasor within the statutory limitations period, but does not file a complaint against the tort-feasor within the applicable statute of limitations.

BACKGROUND

Connie Reimers-Hild was a graduate student at the University of Nebraska (University), and employed by the University as a graduate research assistant. She was a passenger in a University vehicle when she was injured in a collision with Michael Johns on June 8, 1999. Reimers-Hild's injuries arose out of and in the course of her employment,[3] and the State of Nebraska paid workers' compensation benefits for Reimers-Hild. The State is self-insured pursuant to the Nebraska Workers' Compensation Act,[4] and Sedgwick Claims Management Services, Inc. (Sedgwick), is the State's third-party claims administrator for workers' compensation claims.

The State had obtained an "All Lines Aggregate Insurance Policy," issued by Northland Insurance Company (Northland), that was in effect at the time of the accident. The Northland policy provided uninsured and underinsured motorist coverage in the amount of $50,000 for each person, but the policy also contained a self-insured retention of $300,000 for each loss under that section of the policy. As a result, the State was solely responsible for, and Northland had no obligation under the policy to pay, any claim made against the uninsured and underinsured motorist coverage of the policy. Sedgwick was

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[1] Neb. Rev. Stat. §§ 44-6401 to 44-6414 (Reissue 2004).

[2] § 44-6413(1)(e).

[3] See Neb. Rev. Stat. § 48-101 et seq. (Reissue 2004 & Cum. Supp. 2006).

[4] *Id.*

also the third-party claims administrator for claims made on the Northland policy.

Guide One Insurance Company (Guide One) was Johns' motor vehicle liability insurer. Guide One settled Reimers-Hild's claim against Johns, for the policy limit of $25,000, before June 8, 2003, when the 4-year statute of limitations would have expired on that claim.[5] As part of the settlement, Reimers-Hild executed a "Release of All Claims" in which she accepted the $25,000 as consideration for "the final release and discharge" of her claim against Johns. Reimers-Hild never filed suit against Johns. The State, through Sedgwick, was notified of and expressly consented to the settlement, and Guide One paid $12,271.62 to Sedgwick to satisfy the State's workers' compensation lien.

After settling her claim with Johns, Reimers-Hild demanded payment from the State, through Sedgwick, under the State's underinsured motorist coverage. Sedgwick denied the claim on November 3, 2003. Reimers-Hild did not file a claim with the State Claims Board, or any other State agency. Instead, on December 12, she filed a complaint in the district court against the State and the University. An amended complaint, filed July 15, 2004, added Northland as a defendant. The defendants' answer alleged, as an affirmative defense, that Reimers-Hild's claim for underinsured motorist benefits was barred because the underlying tort claim had "expired" within the meaning of § 44-6413(1)(e).

The defendants moved for a separate trial on whether Reimers-Hild's claim was barred by the statute of limitations,[6] which motion the district court granted. Pursuant to the parties' pretrial memoranda, the court's pretrial order specified that the sole issue at trial was to be whether Reimers-Hild's claim for underinsured motorist coverage was timely filed. A trial was had on a stipulated record. The court determined that the case "is governed by Section 44-6413(1)(e)" and that "[b]ecause Reimers-Hild failed to commence an action against Johns within four years, her action here is barred." The court entered judgment against Reimers-Hild, and she appeals.

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[5] See Neb. Rev. Stat. § 25-207 (Reissue 1995).

[6] See Neb. Rev. Stat. § 25-221 (Cum. Supp. 2006).

ASSIGNMENT OF ERROR

Reimers-Hild assigns, consolidated and restated, that the district court erred in finding that her claim was barred by § 44-6413(1)(e).

STANDARD OF REVIEW

[1] The meaning of a statute is a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.[7]

ANALYSIS

[2,3] Section 44-6413(1)(e) bars as untimely an insured's claim for uninsured or underinsured motorist benefits when the statute of limitations on the underlying claim against the uninsured or underinsured motorist has "expired."[8] The purpose underlying § 44-6413(1)(e) is the protection of the insurer when it may have to pay uninsured or underinsured motorist benefits.[9] The statute makes it the responsibility of the insured to preserve the claim against the tort-feasor in order to protect the insurer's rights against the tort-feasor.[10]

But the insured can prevent the statute of limitations from "expiring" against the underlying tort-feasor by filing a timely complaint against the tort-feasor. In *Schrader v. Farmers Mut. Ins. Co.*,[11] an insured who had been injured in an automobile accident brought suit against the tort-feasor within the 4-year statute of limitations applicable to that claim, and then settled the claim. The insured sought underinsured motorist benefits from his insurer, and when they were unable to reach an agreement, the insured filed a complaint against the insurer in the district court.

[4] The insurer in *Schrader* raised a statute of limitations defense pursuant to § 44-6413(1)(e), because the insured's

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[7] *Zach v. Nebraska State Patrol*, 273 Neb. 1, 727 N.W.2d 206 (2007).

[8] *Schrader v. Farmers Mut. Ins. Co.*, 259 Neb. 87, 608 N.W.2d 194 (2000).

[9] *Dworak v. Farmers Ins. Exch.*, 269 Neb. 386, 693 N.W.2d 522 (2005).

[10] See *id.*

[11] *Schrader, supra* note 8.

complaint against the insurer had not been filed within 4 years of the accident. The district court agreed and entered judgment against the insured. We reversed the judgment, explaining that § 44-6413(1)(e) "does not apply if an insured timely files a claim against an uninsured or underinsured motorist because the statute of limitations on the insured's claim against the uninsured or underinsured motorist never expired" within the meaning of § 44-6413(1)(e).[12]

The district court in this case reasoned that our decision in *Schrader* did not apply to Reimers-Hild, because she had not filed a complaint against the alleged tort-feasor. But we believe this to be a distinction without a difference. Reimers-Hild's settlement with Johns extinguished her claim against him, and the statute of limitations applicable to that claim never "expired."

We base that conclusion on the purpose of § 44-6413(1)(e), the plain meaning of the statute, and our case law explaining the statute's function. As previously noted, the purpose of § 44-6413(1)(e) is to protect the insurer's right to pursue a claim against the tort-feasor by making it the insured's responsibility to preserve the claim. More specifically, the statute operates to disallow a claim for uninsured or underinsured motorist coverage where the insured has allowed the underlying tort claim to become barred by not settling *or* bringing suit within the period of limitations.[13] Such a provision is unnecessary when the underlying tort claim has been settled, whether or not the insured files suit against the tort-feasor before settling. Whether the insurer's interests have been adequately preserved by the settlement is a subject addressed by other provisions of the Uninsured and Underinsured Motorist Insurance Coverage Act.[14]

[5] That understanding of § 44-6413 is reflected in the Legislature's use of the word "expired" to describe the statute of limitations for a claim that is time barred. The word "expire," as a legal term, is generally understood to refer to a

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[12] See *id.* at 92, 608 N.W.2d at 198.

[13] Cf. *Hamm v. Allied Mut. Ins. Co.*, 612 N.W.2d 775 (Iowa 2000).

[14] See, e.g., §§ 44-6412 and 44-6413(1)(a).

natural conclusion brought about by the passage of time, not a premature termination effected by some other cause.[15] This is consistent with our decision in *Schrader*, in which the statute of limitations on the underlying tort claim did not "expire," because it was prematurely terminated by suit and settlement. The settlement in this case, although not preceded by a lawsuit, also prevented the statute of limitations on the underlying tort claim from expiring due to passage of time, because the settlement (with the express consent of the State) extinguished the claim against Johns prior to the running of the statute of limitations.

[6] It would be a needless formality, and a waste of judicial resources, to require an insured to file a complaint against an uninsured or underinsured motorist where a settlement agreement has already been reached, and § 44-6413(1)(e) does not require such an action.[16] Instead, we hold that § 44-6413(1)(e) does not apply when an insured has settled his or her claim against an uninsured or underinsured motorist before the statute of limitations applicable to that claim would have expired. The district court erred in concluding otherwise.

[7] We note, before concluding, what is not at issue in this appeal. The record, particularly the pleadings and pretrial order, establishes that the only issue presented to the district court and decided in this proceeding was whether § 44-6413(1)(e) barred Reimers-Hild's claim against the defendants. And it is well established that an appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court.[17]

The defendants, however, have raised two issues in their appellate brief that they did not raise in the trial court. First,

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[15] See, e.g., *In re Morgan*, 181 B.R. 579 (N.D. Ala. 1994); *Mackey v. Bristol West Ins. Services*, 105 Cal. App. 4th 1247, 130 Cal. Rptr. 2d 536 (2003); *Munford Union Bank v. American Ambassador*, 15 S.W.3d 448 (Tenn. App. 1999); *Waynesville Security Bank v. Stuyvesant Ins. Co.*, 499 S.W.2d 218 (Mo. App. 1973).

[16] Cf. *Jones v. Sanger*, 204 W. Va. 333, 512 S.E.2d 590 (1998).

[17] *Coral Prod. Corp. v. Central Resources*, 273 Neb. 379, 730 N.W.2d 357 (2007).

the defendants argue that Reimers-Hild's action is against the State and is barred by sovereign immunity. We recognize that sovereign immunity implicates a jurisdictional issue[18] that may be raised at any time by any party.[19] But the record before us was created by stipulation, and the parties at the time of that stipulation apparently did not contemplate the argument the defendants have asserted on appeal. We do not know what arguments might have been made below, or what evidence might have been adduced, had the State raised a sovereign immunity defense in the district court. For that reason, we do not consider the defendants' sovereign immunity argument.

The defendants also claim that the form of notice Reimers-Hild gave Sedgwick, of the proposed settlement with Johns, was insufficient. Again, this was not raised below, and we do not consider it on appeal. Nor do we consider what statute of limitations would apply to Reimers-Hild's claim for underinsured motorist benefits, or whether there are other statutory barriers to that claim. The sole question argued below and properly before us now is whether § 44-6413(1)(e) operated to bar the claim, and we have answered that question.

CONCLUSION

Because Reimers-Hild settled her claim against Johns, the statute of limitations on that claim did not expire, and § 44-6413(1)(e) does not apply to her claim for underinsured motorist benefits. The judgment of the district court is reversed, and the cause is remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STEPHAN, J., not participating.

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[18] See *Northwall v. State*, 263 Neb. 1, 637 N.W.2d 890 (2002).

[19] See *Betterman v. Department of Motor Vehicles*, 273 Neb. 178, 728 N.W.2d 570 (2007).

STATE OF NEBRASKA, APPELLEE, V. TIMOTHY E. AGEE, APPELLANT.

741 N.W.2d 161

Filed November 9, 2007. No. S-06-594.

1. **Search and Seizure: Appeal and Error.** The denial of a motion for return of seized property is reviewed for an abuse of discretion.
2. **Criminal Law: Search and Seizure: Property.** Property seized in enforcing a criminal law is said to be "in custodia legis," or in the custody of the court.
3. **Police Officers and Sheriffs: Search and Seizure: Property.** Property seized and held as evidence is to be safely kept by the officer seizing it unless otherwise directed by the court, and the officer is to exercise reasonable care and diligence for the safekeeping of the property.
4. **Trial: Search and Seizure: Evidence.** Property seized and held as evidence shall be kept so long as necessary for the purpose of being produced as evidence at trial.
5. **Courts: Jurisdiction: Search and Seizure: Property.** The court in which a criminal charge was filed has exclusive jurisdiction to determine the rights to seized property, and the property's disposition.
6. **Search and Seizure: Property.** The proper procedure to obtain the return of seized property is to apply to the court for its return.
7. ____: ____. Upon the termination of criminal proceedings, seized property, other than contraband, should be returned to the rightful owner unless the government has a continuing interest in the property.
8. ____: ____. While the government is permitted to seize evidence for use in investigation and trial, such property must be returned once criminal proceedings have concluded, unless it is contraband or subject to forfeiture.
9. ____: ____. A motion for the return of seized property is properly denied only if the claimant is not entitled to lawful possession of the property, the property is contraband or subject to forfeiture, or the government has some other continuing interest in the property.
10. **Search and Seizure: Property: Presumptions: Proof.** When criminal proceedings have terminated, the person from whom property was seized is presumed to have a right to its return, and the burden is on the government to show that it has a legitimate reason to retain the property.
11. **Property: Presumptions: Proof.** A presumption of ownership is created by exclusive possession of personal property, and evidence must be offered to overcome that presumption.
12. **Search and Seizure: Property: Proof.** One in possession of property has the right to keep it against all but those with better title, and the mere fact of seizure does not require that "entitlement be established anew."
13. ____: ____: ____. Seizure of property from someone is prima facie evidence of that person's right to possession of the property, and unless another party presents evidence of superior title, the person from whom the property was taken need not present additional evidence of ownership.

14. **Trial: Attorneys at Law: Evidence.** An attorney's assertions at trial are not to be treated as evidence.

Appeal from the District Court for Douglas County: GERALD E. MORAN, Judge. Reversed and remanded for further proceedings.

Timothy E. Agee, pro se.

Jon Bruning, Attorney General, and James D. Smith for appellee.

WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

GERRARD, J.

Timothy E. Agee appeals from the denial of his motion for the return of property seized from his residence by police, who were investigating Agee's reported involvement in several thefts. The theft charge was dismissed, but the court refused to order the return of property the State argued had been stolen. This appeal requires us to consider the circumstances under which the State can refuse to return seized property, and the burden of proving such circumstances. In this case, because the State did not present evidence establishing a basis for refusing to return the property, we reverse the order of the district court.

BACKGROUND

Agee was charged with theft by deception[1] in an information filed November 23, 2004. The information generally charged Agee with using deception to obtain property, valued at over $1,500,[2] from a department store.

For context, it is helpful to note that on the same date, Agee was charged in a separate information with unlawful possession with intent to deliver a controlled substance; specifically,

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[1] See Neb. Rev. Stat. § 28-512 (Reissue 1995).

[2] See Neb. Rev. Stat. § 28-518(1) (Reissue 1995).

marijuana.[3] A habitual criminal charge was later added. The marijuana had been discovered during the execution of a search warrant at Agee's residence on October 8, 2004.[4] The search warrant was supported by information suggesting that Agee was involved in an ongoing scheme to use checks and fraudulent driver's licenses to make purchases at local department stores.[5]

Following a jury trial, on May 24, 2005, the district court convicted Agee on the marijuana charge and found him to be a habitual criminal. On July 25, the theft charge was dismissed without prejudice on the State's motion. On August 31, the court sentenced Agee to 10 years' imprisonment on the drug and habitual criminal convictions.

On April 19, 2006, Agee filed a pro se motion in the district court for an order directing the county sheriff to return property that had been seized from Agee's home, during the October 8, 2004, execution of the search warrant, as evidence of theft. Specifically, Agee asked for the return of 3 watches, 1 diamond bracelet, 2 cellular telephones, 10 assorted articles of clothing, an unspecified number of photographs, and Agee's wallet and Social Security card. Agee specifically alleged that the items were not illegal per se and that they had value to him.

A hearing was held at which Agee, acting pro se, appeared telephonically. In response to Agee's motion, counsel for the State represented that one of the watches, the bracelet, and the cellular telephones were stolen property. The State said it had no record of another two watches. The State explained that the clothing had been stolen from the department store and had already been returned to the store. Agee indicated he had receipts showing how he had lawfully purchased the clothing and bracelet.

No evidence was adduced at the hearing by either party. Nonetheless, the court explained that "[t]hey tell me [the watch] is stolen, [the bracelet] is stolen, there isn't [another]

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[3] See *Baltensperger v. United States Dept. of Ag.*, 250 Neb. 216, 548 N.W.2d 733 (1996) (taking judicial notice of proceedings in related case).

[4] See *State v. Agee*, No. A-05-1153, 2006 WL 2129117 (Neb. App. Aug. 1, 2006) (not designated for permanent publication).

[5] See *id.*

watch, and the clothes are stolen and they have already been given back to the owner, that being [the department store]." The court overruled Agee's motion except as to his Social Security card and photographs, which were ordered returned. Agee appealed.

ASSIGNMENT OF ERROR

Agee argues that the district court committed reversible error when it overruled his motion for the return of his personal property.

STANDARD OF REVIEW

[1] The denial of a motion for return of seized property is reviewed for an abuse of discretion.[6]

ANALYSIS

[2-6] Property seized in enforcing a criminal law is said to be "in custodia legis," or in the custody of the court.[7] Property seized and held as evidence is to be safely kept by the officer seizing it unless otherwise directed by the court, and the officer is to exercise reasonable care and diligence for the safekeeping of the property.[8] The property shall be kept so long as necessary for the purpose of being produced as evidence at trial.[9] The court in which a criminal charge was filed has exclusive jurisdiction to determine the rights to seized property, and the property's disposition.[10] The proper procedure to obtain the return of seized property is to apply to the court for its return.[11]

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[6] See, *State v. Allen*, 159 Neb. 314, 66 N.W.2d 830 (1954); *State v. Maestas*, 11 Neb. App. 262, 647 N.W.2d 122 (2002); Neb. Rev. Stat. §§ 29-818 to 29-820 (Reissue 1995 & Cum. Supp. 2006). See, also, *DeLoge v. State*, 156 P.3d 1004 (Wyo. 2007).

[7] See, *Allen, supra* note 6; *Maestas, supra* note 6.

[8] *Nash v. City of North Platte*, 205 Neb. 480, 288 N.W.2d 51 (1980). See, also, § 29-818.

[9] § 29-818.

[10] See, *State v. Holmes*, 221 Neb. 629, 379 N.W.2d 765 (1986); *Allen, supra* note 6; *State v. Cox*, 3 Neb. App. 80, 523 N.W.2d 52 (1994), *affirmed* 247 Neb. 729, 529 N.W.2d 795 (1995); §§ 29-818 to 29-820.

[11] See, *Allen, supra* note 6; *Maestas, supra* note 6.

We digress, at this point, to respond to the State's contention that we lack jurisdiction over this appeal. Although not disputing the district court's jurisdiction to decide Agee's motion, the State suggests that the court's denial of the motion is not a final, appealable order. The Nebraska Court of Appeals has held that the denial of a motion for the return of seized property is appealable as an order affecting a substantial right made upon a summary application in an action after judgment.[12] The State disagrees, contending that a criminal proceeding is not an "action."[13] An order denying the return of seized property after a criminal proceeding has concluded is perhaps better characterized as an order made in a special proceeding than an order made in an action after judgment.[14] But regardless, we agree with the Court of Appeals' ultimate conclusion that an order of this kind, made after the conclusion of criminal proceedings, is final and reviewable on appeal, so we proceed to the merits of Agee's argument.

[7-9] Although this court has not discussed the issue, the general rule is well established that upon the termination of criminal proceedings, seized property, other than contraband, should be returned to the rightful owner unless the government has a continuing interest in the property.[15] "'[I]t is fundamental to the integrity of the criminal justice process that property involved in the proceeding, against which no Government

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[12] See, *Maestas, supra* note 6; Neb. Rev. Stat. § 25-1902 (Reissue 1995).

[13] See *In re Interest of R.G.*, 238 Neb. 405, 470 N.W.2d 780 (1991) ("action" means civil action), *disapproved on other grounds, O'Connor v. Kaufman*, 255 Neb. 120, 582 N.W.2d 350 (1998).

[14] See, § 25-1902; *In re Interest of R.G., supra* note 13 (special proceeding includes every special statutory remedy not in itself action).

[15] See, e.g., *U.S. v. David*, 131 F.3d 55 (2d Cir. 1997); *Sovereign News Co. v. United States*, 690 F.2d 569 (6th Cir. 1982); *United States v. Wright*, 610 F.2d 930 (D.C. Cir. 1979); *DeLoge, supra* note 6; *Newman v. Stuart*, 597 So. 2d 609 (Miss. 1992); *DeBellis v. New York City Property Clk.*, 79 N.Y.2d 49, 588 N.E.2d 55, 580 N.Y.S.2d 157 (1992); *State v. Ell*, 338 N.W.2d 845 (S.D. 1983); *Banks v Detroit Police Dep't*, 183 Mich. App. 175, 454 N.W.2d 198 (1990).

claim lies, be returned promptly to its rightful owner.'"[16] While the government is permitted to seize evidence for use in investigation and trial, such property must be returned once criminal proceedings have concluded, unless it is contraband or subject to forfeiture.[17] It would be antithetical to the notions of fairness and justice under which we operate to convert the government's right to temporary possession to a right to hold such property indefinitely.[18] Thus, a motion for the return of property is properly denied only if the claimant is not entitled to lawful possession of the property, the property is contraband or subject to forfeiture, or the government has some other continuing interest in the property.[19]

[10-13] The State's primary contention on appeal is that Agee presented no evidence supporting his claim to the property. But this argument misapprehends the burden of proof in such a proceeding. When criminal proceedings have terminated, the person from whom property was seized is presumed to have a right to its return, and the burden is on the government to show that it has a legitimate reason to retain the property.[20] It is long established that a presumption of ownership is created by exclusive possession of personal property and that evidence must be offered to overcome that presumption.[21] One in possession

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[16] *Wright, supra* note 15, 610 F.2d at 934. Accord *People v. Strock*, 931 P.2d 538 (Colo. App. 1996).

[17] See *U.S. v. Chambers*, 192 F.3d 374 (3d Cir. 1999).

[18] See *Government of Virgin Islands v. Edwards*, 903 F.2d 267 (3d Cir. 1990).

[19] See, *David, supra* note 15; *U.S. v. Fitzen*, 80 F.3d 387 (9th Cir. 1996); *DeLoge, supra* note 6; *State v. Alaway*, 64 Wash. App. 796, 828 P.2d 591 (1992).

[20] See, *Chambers, supra* note 17; *U.S. v. Dean*, 100 F.3d 19 (5th Cir. 1996); *United States v. Martinson*, 809 F.2d 1364 (9th Cir. 1987); *DeLoge, supra* note 6; *Com. v. Fontanez*, 559 Pa. 92, 739 A.2d 152 (1999); *DeBellis, supra* note 15; *State v. Shore*, 522 A.2d 1215 (R.I. 1987); *Strock, supra* note 16; *Banks, supra* note 15; *State v. Card*, 48 Wash. App. 781, 741 P.2d 65 (1987).

[21] *In re Estate of Severns*, 217 Neb. 803, 352 N.W.2d 865 (1984). See *Edwards, supra* note 18.

of property has the right to keep it against all but those with better title,[22] and the "mere fact of seizure" does not require that "entitlement be established anew."[23] Seizure of property from someone is prima facie evidence of that person's right to possession of the property, and unless another party presents evidence of superior title, the person from whom the property was taken need not present additional evidence of ownership.[24]

In this case, the State argued to the district court that much of the property was stolen. We agree that stolen property should be returned to its rightful owner.[25] In most cases, the theft of the property will be substantiated by the findings underlying a criminal conviction.[26] But here, the charges had been dismissed. The State had seized property from Agee, and he was presumably entitled to its return once the proceedings were concluded, but the State did not overcome that presumption by presenting evidence of a cognizable claim or right of possession adverse to Agee's.[27] Nor was the property contraband per se, which may not be returned because its possession is inherently unlawful.[28] Nor did the State present evidence of any of the other grounds that have been used to justify the government's retention of property, such as an ongoing investigation,[29] a tax lien,[30] an imposed fine,[31] or an order of restitution.[32]

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[22] *Edwards, supra* note 18.

[23] *Wright, supra* note 15, 610 F.2d at 939. Accord *Edwards, supra* note 18.

[24] See, *Fitzen, supra* note 19; *Edwards, supra* note 18; *Wright, supra* note 15; *Fontanez, supra* note 20; *Shore, supra* note 20; *Ell, supra* note 15; *Strock, supra* note 16; *Banks, supra* note 15.

[25] See § 29-820(1)(a).

[26] See *Dean, supra* note 20.

[27] See, *id.*; *Fitzen, supra* note 19; *Edwards, supra* note 18; *Banks, supra* note 15; *Card, supra* note 20.

[28] See *Boggs v. Rubin*, 161 F.3d 37 (D.C. Cir. 1998).

[29] See, e.g., *DeLoge, supra* note 6.

[30] See, e.g., *Fitzen, supra* note 19; *United States v. Francis*, 646 F.2d 251 (6th Cir. 1981).

[31] See, e.g., *David, supra* note 15.

[32] See, e.g., *U.S. v. Mills*, 991 F.2d 609 (9th Cir. 1993).

[14] The district court erred in relying on the representations made by the State, instead of demanding evidence relevant to the State's allegations. The State must do more than assert, without evidentiary support, that the property was stolen, or is not in the State's possession.[33] An attorney's assertions at trial are not to be treated as evidence.[34] Instead of taking the State's assertions at face value, the court was obliged to take evidence to support its factual findings respecting its decision to grant or deny Agee's motion.[35] The court abused its discretion by substantially denying Agee's motion without requiring the State to submit evidence supporting its continued retention or disposition of the property.[36]

We recognize that there was some dispute, in the district court, about whether certain items claimed by Agee were actually in the possession of the State. But police executing a search warrant are required to keep an inventory that should make it a straightforward matter for the State to establish what property was seized from Agee and how that property was disposed of.[37] And the State's seizure of most of the items was not disputed. We also note that the State admitted to having already returned some items to the store from which they had allegedly been stolen, apparently without direction from the court. This was contrary to the court's exclusive jurisdiction over such property.[38] It has been consistently held, however, that the government's disposition or destruction of property does not moot a motion

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[33] See, *Chambers, supra* note 17; *Mora v. U.S.*, 955 F.2d 156 (2d Cir. 1992); *DeLoge, supra* note 6; *Scott v. State*, 922 So. 2d 1024 (Fla. App. 2006).

[34] *Cochran v. Bill's Trucking*, 10 Neb. App. 48, 624 N.W.2d 338 (2001); *City of Lincoln v. MJM, Inc.*, 9 Neb. App. 715, 618 N.W.2d 710 (2000).

[35] See, *Chambers, supra* note 17; *U.S. v. Burton*, 167 F.3d 410 (8th Cir. 1999); *Rufu v. U.S.*, 20 F.3d 63 (2d Cir. 1994); *Mora, supra* note 33; *DeLoge, supra* note 6; *Scott, supra* note 33; *Dailey v. State*, 640 So. 2d 1059 (Ala. App. 1993); *Card, supra* note 20.

[36] See *DeLoge, supra* note 6.

[37] See, Neb. Rev. Stat. § 29-815 (Reissue 1995); *Rufu, supra* note 35. See, also, *State ex rel. Wagner v. Amwest Surety Ins. Co., ante* p. 121, 738 N.W.2d 813 (2007).

[38] See, *Holmes, supra* note 10; *Allen, supra* note 6; *Cox, supra* note 10; §§ 29-818 to 29-820.

for return of the property, although we have no need in this appeal to discuss the scope of available relief.[39]

CONCLUSION

Once the criminal proceedings against Agee were concluded, Agee was presumptively entitled to the return of property seized from him unless the State presented evidence justifying its refusal to do so. The district court erred in substantially denying Agee's motion without requiring the State to submit such evidence. The district court's order denying Agee's motion is reversed, and the cause is remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

HEAVICAN, C.J., not participating.

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[39] See, e.g., *Chambers, supra* note 17; *U.S. v. Kanasco, Ltd.*, 123 F.3d 209 (4th Cir. 1997); *Thompson v. Covington*, 47 F.3d 974 (8th Cir. 1995); *Rufu, supra* note 35; *Martinson, supra* note 20; *Francis, supra* note 30. Compare, e.g., *Okoro v. Callaghan*, 324 F.3d 488 (7th Cir. 2003); *U.S. v. Hall*, 269 F.3d 940 (8th Cir. 2001); *U.S. v. Potes Ramirez*, 260 F.3d 1310 (11th Cir. 2001); *U.S. v. Bein*, 214 F.3d 408 (3d Cir. 2000); *Peña v. U.S.*, 157 F.3d 984 (5th Cir. 1998) (discussing split over jurisdiction to award money damages).

DAVID HOGELIN AND INTERNATIONAL ASSOCIATION OF FIREFIGHTERS LOCAL NO. 1575, APPELLEES, V. CITY OF COLUMBUS, NEBRASKA, A POLITICAL SUBDIVISION, AND DEAN HEFTI, IN HIS OFFICIAL CAPACITY AS CHIEF OF THE CITY OF COLUMBUS FIRE DEPARTMENT, APPELLANTS.

741 N.W.2d 617

Filed November 16, 2007. No. S-06-641.

1. **Injunction: Equity: Appeal and Error.** An action for injunction sounds in equity. In an appeal of an equity action, an appellate court tries the factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court.
2. **Contracts: Judgments: Appeal and Error.** The meaning of a contract is a question of law, in connection with which an appellate court has an obligation to reach its conclusions independently of the determinations made by the court below.

3. **Labor and Labor Relations: Waiver.** A waiver of a statutory right in a collective bargaining agreement must be established by clear and express contractual language.
4. **Labor and Labor Relations: Waiver: Proof.** An employer bears the burden of establishing that a clear and unmistakable waiver of a statutory right in a collective bargaining agreement has occurred.
5. **Labor and Labor Relations: Employment Contracts: Waiver.** A clear and unmistakable waiver of a statutory right may be found in the express language of a collective bargaining agreement, or it may be implied from the structure of an agreement and the parties' course of conduct.
6. ____: ____: ____. A waiver of statutory rights in a collective bargaining agreement must be knowingly made and must specifically address the subject upon which the waiver is claimed.
7. ____: ____: ____. No waiver of a statutory right will be implied in a collective bargaining agreement unless it is clear that the parties were aware of their rights and made the conscious choice to waive them.
8. **Waiver: Words and Phrases.** A waiver is a voluntary and intentional relinquishment of a known right.
9. **Injunction.** An injunction is an extraordinary remedy that ordinarily should not be granted except in a clear case where there is actual and substantial injury. Such a remedy should not be granted unless the right is clear, the damage is irreparable, and the remedy at law is inadequate to prevent a failure of justice.
10. **Equity: Words and Phrases.** An adequate remedy at law means a remedy which is plain and complete and as practical and efficient to the ends of justice and its prompt administration as the remedy in equity.
11. **Injunction: Damages: Words and Phrases.** An injury is irreparable when it is of such a character or nature that the party injured cannot be adequately compensated in damages, or when the damages which may result cannot be measured by any certain pecuniary standard.
12. ____: ____: ____. Irreparable injury, as used in the law of injunction, does not necessarily mean that the injury is beyond the possibility of compensation in damages, nor that it must be very great.
13. **Injunction: Public Officers and Employees.** Unlawful acts by public officers may, in a proper case, be restrained.
14. **Actions: Injunction.** When an action is brought to enforce a statute or make effective a declared policy of the Legislature, the standards of public interest and not the requirements of private litigation measure the propriety and need for injunctive relief.
15. **Injunction.** A remedy at law is not adequate if the situation requires and the law permits preventative relief as preventing the repetition and continuance of wrongful acts.
16. ____. Injunction may be withheld when it is likely to inflict greater injury than the grievance complained of.
17. **Equity.** If the protection of a legal right would do a plaintiff comparatively little good and would produce great public or private hardship, equity will remit the plaintiff to his or her legal rights and remedies.

Appeal from the District Court for Platte County: ROBERT R. STEINKE, Judge. Affirmed.

Mark A. Fahleson and David J.A. Bargen, of Rembolt Ludtke, L.L.P., for appellants.

John E. Corrigan, of Dowd, Howard & Corrigan, L.L.C., for appellees.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

GERRARD, J.

This case involves a dispute between the City of Columbus (the City) and its firefighters about whether training sessions mandated by the City would have resulted in a violation of state law regulating the hours firefighters can be required to work.[1] The district court concluded that the scheduled sessions were unlawful and enjoined the City from requiring them. The issues presented in this appeal are whether the scheduled training sessions would have violated the law and whether the firefighters were entitled to injunctive relief.

BACKGROUND

At the time of trial, the City maintained a force of 12 full-time career firefighters and 72 volunteers. A shift for paid firefighters was 24 hours, and the fire department had three shifts that rotated on a 3-day cycle to provide full-time, 24-hour coverage. The City's description of the job of "Firefighter/Emergency Medical Technician" stated, in relevant part, that the job "require[d] knowledge and skill acquired only through specialized training" and that firefighters would be required to "successfully complete all required in-service training requirements."

Dean Hefti, the Columbus fire chief, explained that for their safety, emergency management responders need to be trained in awareness and operations with respect to hazardous materials. In addition, the City had received a homeland security

[1] See Neb. Rev. Stat. § 35-302 (Reissue 2004).

grant for a hazardous materials response team. Hefti testified that the grant money was at risk unless the City assembled such a team. To that end, Hefti arranged mandatory hazardous materials training sessions. But Hefti said that while the grant "was there," the reason he made the training mandatory was "the safety of the firefighters and the responding personnel to industrial accidents, car accidents, et cetera," as well as public safety. Firefighters had attended off-shift training sessions before, but had done so at their own individual request, subject to Hefti's approval.

The training sessions at issue in this case were scheduled and conducted by the State Fire Marshal Training Division, and held at the Columbus Fire Department. Hefti explained that the State Fire Marshal was used because it met "NFPA code" and was available at no cost. The training sessions were scheduled for 7 p.m. on Thursday evenings: May 5, 12, and 26, 2005; June 23 and 30; and July 7, 14, 21, and 28. Hefti said that the State Fire Marshal did not agree to alternative schedules he had suggested.

Letters to Hefti from the State Fire Marshal Training Division explained that "[t]here must be at least **14** students in attendance at the course or it may be subject to cancellation. Please make sure your members attend these courses, since proper training is vital to every emergency response organization." The letters also encouraged Hefti to invite others, such as law enforcement and emergency services personnel, and included a form letter for that purpose.

Hefti sent a memorandum to all career personnel explaining the mandatory training schedule. David Hogelin, president of the firefighters' union, the International Association of Firefighters Local No. 1575 (the Union), objected on the firefighters' behalf. Hogelin's letter to Hefti explained that "[n]ine weeks of every Thursday night is a strain on the families of the fighters, who already spend every third day at the station." Hogelin suggested that the training could be accomplished more quickly and on duty time.

Hogelin's letter specifically cited state law as barring the mandatory training sessions. Section 35-302 provides that

firefighters employed by cities having paid fire departments "shall not be required to remain on duty for periods of time which will aggregate in each month more than an average of sixty hours per week." Hogelin explained that including the additional training hours, Columbus firefighters would be required to work an average of 61.76 hours a week.

In response to Hogelin's letter, Hefti and the Columbus city administrator provided Hogelin with a memorandum concluding that the required sessions were legal under the collective bargaining agreement (CBA) between the Union and the City and that the sessions would remain mandatory. Section 35-302 provides that a firefighter's single-duty shift shall be 24 consecutive hours, followed by an off-duty period as necessary to comply with the statute, "unless by voluntary agreement between the city and the firefighter, any firefighter may be permitted to work an additional period of consecutive time," and may return to work after less than 24 hours off duty. The City's position was that the CBA was such a "voluntary agreement," because it provided in relevant part that

> [a]ll management rights, functions, responsibilities, and authority not specifically limited by the express terms of this Agreement [or] State Statute . . . are retained by the [City] and remain exclusively within the rights of the [City]. These rights, powers, and authority include, but are not limited to . . . the scheduling of operations and the time to be worked . . . .

The CBA also provided that the normal work schedule would be "24 hours on, followed by 48 hours off, with the workday starting at 8 a.m." but that "[s]hould it be necessary in the judgment of the [City] to establish different work schedules or starting time, notice of such changes shall be given to the Union as far in advance as is reasonably possible." Hogelin averred, however, that as Union president, he had never discussed waiving any rights of Union members under § 35-302.

On May 10, 2005, Hogelin and the Union (hereinafter collectively the Union) filed a complaint in the district court against Hefti and the City (hereinafter collectively the City), seeking declaratory and injunctive relief, and a motion for a temporary

injunction. An evidentiary hearing on the motion was held on May 27 on the underlying legal issues and the firefighters' damages.

Hogelin averred that pursuant to a court-ordered visitation schedule, he was entitled to visitation with his son on every Thursday evening he was not scheduled to work and that the mandatory training would have the effect of depriving him of visitation. Ryan Loewnstein averred that he received a written reprimand after he failed to attend a May 5, 2005, training session, even though Hefti had already approved his request for leave to attend a wedding in North Carolina. Several other firefighters had been reprimanded for failing to attend the training sessions. Hefti also conceded that although fewer than 14 students attended the May 12 session, it had not been canceled.

The district court concluded that the mandatory training schedule would invade the firefighters' off-duty hours, protected by § 35-302. The court further concluded that the collective bargaining agreement did not override § 35-302. The court found that the firefighters would suffer irreparable harm, as Hefti had already reprimanded firefighters who had failed to attend training in their off-duty hours, and that "the threat of additional disciplinary measures for future nonattendance is real and genuine, not imaginary." The court entered a temporary injunction ordering Hefti and the City not to impose the mandatory hazardous materials training. On substantially the same evidence, on May 10, 2006, the court entered a permanent injunction to the same effect.

ASSIGNMENTS OF ERROR

The City assigns that the court erred in granting relief to the Union because (1) the requirement that firefighters attend hazardous materials training does not violate § 35-302, (2) training is not "harm" entitling the Union to injunctive relief, and (3) even if the training is "harm," it is compensable by money damages.

STANDARD OF REVIEW

[1] An action for injunction sounds in equity. In an appeal of an equity action, an appellate court tries the factual questions

de novo on the record and reaches a conclusion independent of the findings of the trial court.[2]

[2] The meaning of a contract is a question of law, in connection with which an appellate court has an obligation to reach its conclusions independently of the determinations made by the court below.[3]

ANALYSIS

Violation of § 35-302

We note, initially, that the City's brief does not take issue with the court's conclusion that the hazardous materials training requirement, if implemented, would place the firefighters' working hours in violation of the 60-hour-per-week limitation imposed by § 35-302. Instead, the City's argument that the requirement would not violate § 35-302 is premised entirely on the CBA, so our analysis of the City's first assignment of error is also limited to the effect of the CBA. Section 35-302 provides in full:

> Firefighters employed in the fire departments of cities having paid fire departments shall not be required to remain on duty for periods of time which will aggregate in each month more than an average of sixty hours per week. Each single-duty shift shall consist of twenty-four consecutive hours and shall be followed by an off-duty period as necessary to assure compliance with the requirements of this section unless by voluntary agreement between the city and the firefighter, any firefighter may be permitted to work an additional period of consecutive time and may return to work after less than a twenty-four-hour off-duty period. Any firefighter may be assigned to work less than a twenty-four-hour shift, but in such event the firefighter shall not work in excess of forty hours per week. No firefighter shall be required to perform any work or service

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[2] *Pony Lake Sch. Dist. v. State Committee for Reorg.*, 271 Neb. 173, 710 N.W.2d 609 (2006), *cert. denied* 547 U.S. 1130, 126 S. Ct. 2058, 164 L. Ed. 2d 784.

[3] *Pennfield Oil Co. v. Winstrom*, 272 Neb. 219, 720 N.W.2d 886 (2006).

> as such firefighter during any period in which he or she is off duty except in cases of extraordinary conflagration or emergencies or job-related court appearances.

The City claims that the provisions of the CBA set forth above effected a "voluntary agreement," within the meaning of § 35-302, to alter the firefighters' work schedules by conferring scheduling authority on the City.

We note that there is substantial authority for the proposition that some statutory rights, particularly those intended to serve an important public policy or guarantee the personal rights of individual workers, cannot be waived through collective bargaining.[4] For instance, an individual's statutory protection against discrimination cannot generally be waived by his or her collective bargaining agent.[5] "While a union undeniably has the power to waive statutory rights related to collective activity . . . certain other statutory rights stand on a different footing. . . . Rights of this kind, which are of a personal, and not merely economic, nature are beyond a labor union's ability to bargain away."[6] But for purposes of our analysis in this case, we assume, without deciding, that the rights protected by § 35-302 could be waived through collective bargaining. We need not answer that question, because we conclude that the CBA at issue in this case did not effect such a waiver.

[3] It is well settled that a waiver in a collective bargaining agreement must be established by clear and express contractual

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[4] See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 94 S. Ct. 1011, 39 L. Ed. 2d 147 (1974). See, e.g., *Cooper v. Smithfield Terminal Ry. Co.*, 635 A.2d 952 (Me. 1993); *School Comm. of Brockton v. Massachusetts Commission Against Discrimination*, 377 Mass. 392, 386 N.E.2d 1240 (1979); *Wright v. City of Santa Clara*, 213 Cal. App. 3d 1503, 262 Cal. Rptr. 395 (1989); *City of Orlando v. Intern. Ass'n of F. F., etc.*, 384 So. 2d 941 (Fla. App. 1980). Cf. *Matter of ABC v Roberts*, 61 N.Y.2d 244, 461 N.E.2d 856, 473 N.Y.S.2d 370 (1984) (waiver of statutory rights permissible where legislative purpose not contravened).

[5] See *Alexander, supra* note 4.

[6] *School Comm. of Brockton, supra* note 4, 377 Mass. at 399, 386 N.E.2d at 1244.

language.[7] As the U.S. Supreme Court has stated, "we will not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is 'explicitly stated.' More succinctly, the waiver must be clear and unmistakable."[8]

[4-7] An employer bears the burden of establishing that a clear and unmistakable waiver has occurred.[9] A clear and unmistakable waiver may be found in the express language of a collective bargaining agreement, or it may even be implied from the structure of an agreement and the parties' course of conduct.[10] But a waiver of statutory rights in a CBA must be knowingly made and must specifically address the subject upon which the waiver is claimed.[11] The contract must demonstrate that the intent of the parties was to preempt statutory rights.[12] No waiver will be implied unless it is clear that the parties were aware of their rights and made the conscious choice, for whatever reason, to waive them.[13]

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[7] *Central City Educ. Ass'n v. IELRB*, 149 Ill. 2d 496, 599 N.E.2d 892, 174 Ill. Dec. 808 (1992). See *Crete Ed. Assn. v. Saline Cty. Sch. Dist. No. 76-0002*, 265 Neb. 8, 654 N.W.2d 166 (2002). See, e.g., *Carson v. Giant Food, Inc.*, 175 F.3d 325 (4th Cir. 1999); *N.L.R.B. v. New York Telephone Co.*, 930 F.2d 1009 (2d Cir. 1991); *Timkin Roller Bearing Company v. N. L. R. B.*, 325 F.2d 746 (6th Cir. 1963); *State ex rel. v. Local School Dist.*, 89 Ohio St. 3d 191, 729 N.E.2d 743 (2000); *Appeal of White Mts. Regional School Bd.*, 125 N.H. 790, 485 A.2d 1042 (1984); *Faust v. Ladysmith-Hawkins School Systems*, 88 Wis. 2d 525, 277 N.W.2d 303 (1979); *Francini v. Phoenix Newspapers, Inc.*, 188 Ariz. 576, 937 P.2d 1382 (Ariz. App. 1996).

[8] *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708, 103 S. Ct. 1467, 75 L. Ed. 2d 387 (1983). Accord, *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70, 119 S. Ct. 391, 142 L. Ed. 2d 361 (1998); *Hammond v. State, Dept. of Transp.*, 107 P.3d 871 (Alaska 2005); *Pasco Police Ass'n v. City of Pasco*, 132 Wash. 2d 450, 938 P.2d 827 (1997); *Dept. of Cent. Management Services v. Bd.*, 373 Ill. App. 3d 242, 869 N.E.2d 274, 311 Ill. Dec. 600 (2007).

[9] *New York Telephone Co., supra* note 7.

[10] *Id.*

[11] See *Pasco Police Ass'n, supra* note 8.

[12] See, *Local School Dist., supra* note 7; *Dept. of Cent. Management Services, supra* note 8.

[13] *New York Telephone Co., supra* note 7; *Pasco Police Ass'n, supra* note 8.

The parties' CBA in this case does not demonstrate a clear and unmistakable waiver of the firefighters' rights under § 35-302. There is no mention in the CBA of the statute or its requirements,[14] and silence in the bargaining agreement on such an issue does not meet the test.[15] The language relied upon by the City refers only in general terms to the City's responsibility for establishing duty schedules, and "[b]road, general language is not sufficient to meet the level of clarity required to effect a waiver in a CBA."[16] In fact, to the extent that statutory limitations on working conditions are mentioned in the CBA, that language supports the Union's argument, because the CBA reserves to the City all management responsibilities "*not* . . . limited by . . . State Statute." (Emphasis supplied.) And the only evidence in the record relevant to the negotiations between the parties, Hogelin's affidavit, implies that § 35-302 was not the subject of bargaining.

[8] The City contends that the authority cited above is inapplicable to this case, because § 35-302 permits firefighters to voluntarily agree to work beyond the hours permitted by the statute. The City asserts that because § 35-302 contains an "exception" for voluntary agreements, the CBA is not really a "waiver" of statutory rights that must be clear and unmistakable. But the City's argument is unavailing. The fact that rights under § 35-302 *can* be waived by voluntary agreement does not prove that they *were* waived in the absence of evidence to that effect. And contrary to the City's suggestion, a voluntary agreement as allowed by § 35-302 is a "waiver" of a statutory right. A "waiver" is "a voluntary and intentional relinquishment of a known right."[17] Section 35-302 provides firefighters with statutory rights and permits firefighters to waive those rights by voluntary agreement, but does not alter

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[14] See, *Bratten v. SSI Services, Inc.*, 185 F.3d 625 (6th Cir. 1999); *Quint v. A.E. Staley Mfg. Co.*, 172 F.3d 1 (1st Cir. 1999). Compare, e.g., *Frontier Ins. Co. v. Koppell*, 225 A.D.2d 93, 648 N.Y.S.2d 812 (1996).

[15] See *Timkin Roller Bearing Company, supra* note 7.

[16] *Carson, supra* note 7, 175 F.3d at 331.

[17] *Faust, supra* note 7, 88 Wis. 2d at 532-33, 277 N.W.2d at 306. See, also, *Crete Ed. Assn., supra* note 7; *Koppell, supra* note 14.

the well-established principle that such a waiver must be clearly and expressly established.

In short, we will not assume that the Union waived a statutory right unless that waiver is clearly established, and nothing in the CBA or the record in this case establishes a clear and unmistakable waiver of the firefighters' rights under § 35-302. The City's first assignment of error is without merit.

Availability of Injunctive Relief

The City contends that even if the mandatory training schedule was in violation of § 35-302, injunctive relief was inappropriate. We disagree.

[9] We acknowledge that an injunction is an extraordinary remedy that ordinarily should not be granted except in a clear case where there is actual and substantial injury. Such a remedy should not be granted unless the right is clear, the damage is irreparable, and the remedy at law is inadequate to prevent a failure of justice.[18] The City argues that the firefighters had an adequate remedy at law.

[10-12] But an adequate remedy at law means a remedy which is plain and complete and as practical and efficient to the ends of justice and its prompt administration as the remedy in equity.[19] And an injury is irreparable when it is of such a character or nature that the party injured cannot be adequately compensated in damages, or when the damages which may result cannot be measured by any certain pecuniary standard.[20] Irreparable injury, as used in the law of injunction, does not necessarily mean that the injury is beyond the possibility of compensation in damages, nor that it must be very great.[21]

[13,14] The City argues that the firefighters were not entitled to injunctive relief because "being required to attend [hazardous materials] training three hours a week for a few weeks in the summer certainly does not rise to the level of an 'irreparable

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[18] *Lambert v. Holmberg*, 271 Neb. 443, 712 N.W.2d 268 (2006).

[19] *Id.*

[20] See *Rath v. City of Sutton*, 267 Neb. 265, 673 N.W.2d 869 (2004).

[21] *Id.*

harm.'"[22] But that requirement violates state law, and unlawful acts by public officers may, in a proper case, be restrained.[23] When an action is brought to enforce a statute or make effective a declared policy of the Legislature, the standards of public interest and not the requirements of private litigation measure the propriety and need for injunctive relief.[24] Here, the firefighters were being required to work in excess of the hours that the Legislature has determined, as a matter of public policy, to be permissible without specific agreement. That represents an injury that the district court correctly considered in determining the relief to be afforded. We also note the City's implicit concession that the firefighters were entitled to monetary compensation for the time spent in training. Effectively, the City would be unlawfully expending public funds—also an injury subject to injunction.[25]

The City also contends that the mandatory training was not "harm" at all, because the firefighters would benefit from the training, and had requested training in the past. We disagree with the City's suggestion that an unlawful work requirement does not "harm" an individual simply because it is believed to be for the individual's own good. And in any event, the Legislature's decision to enact § 35-302 forecloses that contention.

Next, the City argues that the harm was not irreparable because it involved time at work, which is compensable in money damages. It is not entirely clear, however, what pecuniary standard the City is suggesting should be applied to compensate the firefighters for its unlawful work requirements. It appears that the City is contending that the firefighters would be made whole if they were paid the wages due for the work required of them.

But if the sole relief available to the Union is that the City simply pay the firefighters wages for the time spent training,

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[22] Brief for appellants at 24.

[23] See *Kuester v. State*, 191 Neb. 680, 217 N.W.2d 180 (1974).

[24] See *Edwards v. Boston*, 408 Mass. 643, 562 N.E.2d 834 (1990). See, also, *Tulsa Order of Police Lodge v. Tulsa*, 39 P.3d 152 (Okla. Civ. App. 2001); *Weimer v. City of Baton Rouge*, 915 So. 2d 875 (La. App. 2005).

[25] See *Farrell v. School Dist. No. 54*, 164 Neb. 853, 84 N.W.2d 126 (1957).

then § 35-302 would be effectively unenforceable. We have stated that "if an absence of irreparable harm (beyond the illegality of the expenditure itself) prevents a court from deciding if an illegal expenditure of public funds has occurred, following the law becomes irrelevant to those entrusted to uphold it."[26] Similarly, if the City was permitted to require firefighters to work whatever hours it pleased, subject only to the requirement that they be paid, then § 35-302 would cease to be relevant to those charged with obeying it.

[15] Instead, we have said that a remedy at law is not adequate if the situation requires and the law permits preventative relief as preventing the repetition and continuance of wrongful acts.[27] Whether damages are to be viewed by a court of equity as "irreparable" depends more upon the nature of the right which is injuriously affected than upon the pecuniary measure of the loss suffered.[28] And in certain circumstances, severe personal inconvenience can constitute irreparable injury justifying issuance of injunctive relief.[29] We have little difficulty in concluding on the facts of this case that the City's violation of state law, expressed intent to continue violating state law, and imposition upon firefighters that resulted from that policy, justified the district court's order of injunctive relief.[30]

In arguing to the contrary, the City relies on *Davenport v. International Broth. of Teamsters*,[31] in which the D.C. Circuit concluded that members of a flight attendants' union were not entitled to an injunction against a change in their work schedules that exceeded the limitations imposed by their CBA. But *Davenport* is readily distinguishable. In *Davenport*, the flight attendants' "principal contention" was that the proposed

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[26] *Rath, supra* note 20, 267 Neb. at 281, 673 N.W.2d at 885.

[27] *Adams v. Adams*, 156 Neb. 778, 58 N.W.2d 172 (1953).

[28] *Burroughs Wellcome & Co. v. Johnson Wholesale Perfume Co.*, 128 Conn. 596, 24 A.2d 841 (1942). See *Armbruster v. Stanton-Pilger Drainage Dist.*, 169 Neb. 594, 100 N.W.2d 781 (1960).

[29] *CWA v. Treffinger*, 291 N.J. Super. 336, 677 A.2d 295 (1996).

[30] See, *Adams, supra* note 27; *Burroughs Wellcome & Co., supra* note 28.

[31] *Davenport v. International Broth. of Teamsters*, 166 F.3d 356 (D.C. Cir. 1999).

schedules "increase[d] the flight time required of flight attendants in a given duty period, while at the same time eliminating attendants' per diem pay and hotel allowances because overnight stays are no longer required on such trips."[32] The D.C. Circuit concluded that their injury could be remedied with money damages, invoking the proposition that "'temporary loss of income, ultimately to be recovered, does not usually constitute irreparable injury.'"[33] In other words, the issue decided by the D.C. Circuit in *Davenport* was whether the income lost by the flight attendants was an irreparable harm. In the present case, lost income is not at issue.

[16,17] Finally, the City argues that injunction should have been denied because the benefits to the firefighters and the public from hazardous materials training outweighed any injury to the firefighters resulting from the training requirement. We acknowledge the general proposition that injunction may be withheld when it is likely to inflict greater injury than the grievance complained of.[34] "'If the protection of a legal right even would do a plaintiff but comparatively little good and would produce great public or private hardship, equity will withhold its discreet and beneficent hand and remit the plaintiff to his legal rights and remedies.'"[35]

But the City's public policy argument is forestalled by § 35-302. It is the function of the Legislature through the enactment of statutes to declare what is the law and public policy of this state.[36] Although the City adduced very little evidence at trial to support its public policy argument, we are not in a position to question the benefits of training firefighters about hazardous materials. But those benefits must be obtained either within the limitations imposed as a matter of public policy by the Legislature or with the voluntary agreement of

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[32] *Id.* at 367.

[33] *Id.*

[34] *Lambert, supra* note 18. See, also, *Edwards, supra* note 24.

[35] *Lambert, supra* note 18, 271 Neb. at 451, 712 N.W.2d at 276.

[36] *In re Claims Against Atlanta Elev., Inc.*, 268 Neb. 598, 685 N.W.2d 477 (2004).

the firefighters to do otherwise. Section 35-302 contains exceptions for "extraordinary conflagration or emergencies or job-related court appearances." Perhaps job-related training should be added to that list of exceptions. But if so, that decision belongs to the Legislature.

For those reasons, we find the City's remaining assignments of error to be without merit.

CONCLUSION

We conclude that the parties' collective bargaining agreement did not effect a waiver of the firefighters' rights under § 35-302 and that the district court did not err in enjoining the City's enforcement of its unlawful policy. The judgment of the district court is affirmed.

AFFIRMED.

RICK EASTLICK, APPELLANT, V. LUEDER CONSTRUCTION COMPANY, A DISSOLVED NEBRASKA CORPORATION, ET AL., APPELLEES.

741 N.W.2d 628

Filed November 16, 2007. No. S-06-721.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Negligence.** Whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular case.
4. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusions reached by the trial court.
5. **Negligence: Liability: Contractors and Subcontractors.** Generally, one who employs an independent contractor is not liable for physical harm caused to another by the acts or omissions of the contractor or his servants. There are two recognized exceptions to the general rule which may allow the employer of an independent contractor to be held vicariously liable to a third party. Those two exceptions are where (1) the employer retains control over the contractor's work or (2) the employer has a nondelegable duty to protect another from harm.

6. **Negligence: Contractors and Subcontractors.** Nondelegable duties include (1) the duty of an owner in possession and control of premises to provide a safe place for work by an independent contractor's employee, (2) a duty imposed by statute or rule of law, and (3) the duty of due care when the independent contractor's work involves special risks or dangers.
7. **Negligence: Liability: Contractors and Subcontractors: Words and Phrases.** A nondelegable duty means that an employer of an independent contractor, by assigning work consequent to a duty, is not relieved from liability arising from the delegated duties negligently performed.
8. **Negligence: Liability: Contractors and Subcontractors.** Liability for breach of a nondelegable duty is an exception to the general rule that one who employs an independent contractor is not liable for the independent contractor's negligence.
9. **Negligence: Words and Phrases.** A peculiar risk must involve some special hazard resulting from the nature of the work done, which calls for special precautions.
10. **Contractors and Subcontractors: Employer and Employee.** The duty of a general contractor to employees of a subcontractor extends only to providing a reasonably safe place to work as distinguished from apparatus, tools, or machinery furnished by the subcontractor for the use of his own employees.

Appeal from the District Court for Dodge County: JOHN E. SAMSON, Judge. Affirmed.

Michaela Skogerboe and James E. Harris, of Harris Kuhn Law Firm, L.L.P., for appellant.

Patricia McCormack and Eugene L. Hillman, of Hillman, Forman, Nelsen, Childers & McCormack, for appellees.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MILLER-LERMAN, JJ.

WRIGHT, J.

NATURE OF CASE

Rick Eastlick was employed as a bricklayer for Monona Masonry, Inc. (Monona), which was doing masonry work at a church construction site in Fremont, Nebraska. Eastlick was working on scaffolding when it collapsed, and he sustained serious injuries. The general contractor for the project was Lueder Construction Company (Lueder). Eastlick sued Lueder for damages. The district court concluded that Lueder owed no duty to Eastlick related to the accident, and it granted Lueder's motion for summary judgment. Eastlick appeals.

SCOPE OF REVIEW

[1,2] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Papillion Rural Fire Prot. Dist. v. City of Bellevue, ante* p. 214, 739 N.W.2d 162 (2007). In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Id.*

FACTS

On October 24, 2000, Eastlick was working on scaffolding at a church construction project. The scaffolding collapsed, and Eastlick fell approximately 20 feet to the ground, sustaining injuries, including a fracture of the right femur that required surgery. Eastlick also developed posttraumatic stress disorder.

The metal scaffolding was described as a "Morgan scaffold." The sections of scaffolding stacked on top of each other, with planks in between to allow workers to walk on the scaffolding. The scaffolding was held together by straight braces and "X" braces. The planks were mechanically raised as brickwork was finished and the work area became higher from the ground.

On the day of Eastlick's accident, two sections of scaffolding were in place, but no planks had been set up. Another bricklayer, Jesse Stout, said he and Eastlick were directed by a Monona employee to change the straight brace at the top of the scaffolding. They climbed to the top of the scaffolding, and Eastlick removed an X brace rather than a straight brace, resulting in a collapse of the scaffolding.

Richard Gegzna, who worked as a bricklayer foreman for Monona at the time of the accident, explained that a Morgan scaffold is a single tower connected together in 9-foot sections with a cable crank. Sections can be added using X braces and straight braces. Eastlick and Stout climbed the scaffolding to change a straight brace that held the scaffolding together because one of the bars was bent. Gegzna's back was turned when the accident occurred, but he saw the two men hit the

ground. He examined the scaffolding later and determined that pins had been removed from the X brace on Eastlick's side of the scaffolding. Gegzna testified that if an X brace and a straight brace were both removed, the scaffolding could fall.

According to Gegzna, Lueder did not recommend the type of scaffolding or provide instructions on setup or dismantling. Lueder did not direct Monona as to the tools to be used, but Lueder had specifications on how the work should be done, and it had a safety program and policy. Gegzna did not recall whether Monona employees participated in Lueder's safety program.

Wayne Schiltz, a field supervisor for Monona at the time of the accident, stated that the Morgan scaffolding owned by Monona was used on the jobsite. Lueder did not deliver or make repairs to the Morgan scaffolding and had nothing to do with how the scaffolding was erected. Schiltz said that Eastlick had experience with scaffolding and usually helped with repairs of scaffolding or replacement of parts.

Schiltz described the X brace as a unit with a pin through the center of it. The straight brace holds the scaffolding together and stabilizes the X brace. It takes three people to safely erect or dismantle the scaffolding. Schiltz said that Eastlick had damaged a brace with a forklift as the scaffolding was brought in and that Schiltz directed Eastlick and Stout to replace the brace. They leaned a section of scaffolding against another section and then removed the bent brace without first replacing it. The scaffolding then fell. Schiltz did not see the accident, but he saw that the scaffolding had collapsed.

Schiltz opined that it was "[u]nbelievable for two men that has [sic] worked for us for many years with the same very equipment and do something so horrendous as that. It's unbelievable." Eastlick and Stout told Schiltz that they had pulled the pins out of the brace. Three pins were missing from the collapsed scaffolding.

Eastlick filed a complaint against Lueder, Monona, and American Family Mutual Insurance Company on October 20, 2004, alleging that Lueder, as the general contractor, had control and supervision over all aspects of the construction project and had a duty to foresee that the masonry work was likely to

create peculiar risks or involve peculiar or inherent dangers. Eastlick alleged that Lueder (1) violated its nondelegable duty to provide a reasonably safe place to work; (2) violated its statutory duties under the requirements of the Occupational Safety and Health Administration (OSHA); (3) violated its nondelegable duties to see that the work performed by the independent contractors involving peculiar risks was done with a requisite degree of care by taking adequate safety precautions and measures; and (4) failed to ensure that the scaffolding was erected, moved, and dismantled under the supervision of or by a competent, qualified person.

Eastlick alleged that as a result of the accident, he was injured and incurred hospital, medical, and related health care expenses. He claimed that he was totally disabled from October 24 through December 4, 2000, resulting in lost wages of $6,945, and that he would continue to sustain lost earnings and loss of earning capacity in the future.

Lueder denied Eastlick's allegations but admitted it was the general contractor for the construction project. Lueder alleged that Eastlick's exclusive remedy was workers' compensation; that Lueder owed no duty of care to Eastlick, who was an employee of a subcontractor; and that the use of scaffolding did not involve a peculiar risk or constitute an ultrahazardous activity.

The district court sustained Lueder's motion for summary judgment and overruled Eastlick's motion for partial summary judgment. The court found that the peculiar risk doctrine did not apply. There was no dispute that Monona owned the scaffolding and that the scaffolding had been erected by Monona employees. The court found that Lueder's duty to Eastlick extended only to provide a reasonably safe place to work and did not include a duty to inspect equipment that was owned, directed, or controlled by Monona. There was no dispute that Monona was cited by OSHA for safety violations and that Lueder was not cited for any OSHA violation. The court concluded that the record did not support an action for negligence against Lueder.

Eastlick's motion to reconsider was overruled, and he timely perfected this appeal.

ASSIGNMENTS OF ERROR

Eastlick assigns the following errors, summarized and restated: The district court erred (1) in finding that Lueder, as general contractor, owed no duty to Eastlick and that Eastlick had no claim against Lueder for his injuries; (2) in dismissing Eastlick's claim based on the finding that Lueder had no duty to inspect equipment owned, directed, and controlled by its subcontractor (Monona), where Eastlick's claim was based on an unsafe condition and activity on the premises; (3) in finding that the work performed by Eastlick at the time of the accident did not create a peculiar risk of physical harm without the taking of special precautions; (4) in finding that there was no breach of Lueder's duty to Eastlick, which was an issue of fact; and (5) in failing to find that Lueder owed Eastlick a duty to keep the premises in a reasonably safe condition.

ANALYSIS

Eastlick, who was employed as a bricklayer for Monona, sustained serious injuries when the scaffolding he was standing on collapsed. Eastlick alleged that Lueder's negligence resulted in his injuries. In order to prevail in a negligence action, a plaintiff must establish the defendant's duty to protect the plaintiff from injury, a failure to discharge that duty, and damages proximately caused by the failure to discharge that duty. *National Am. Ins. Co. v. Constructors Bonding Co.*, 272 Neb. 169, 719 N.W.2d 297 (2006).

The first issue is whether Lueder, the general contractor, owed Eastlick a duty to protect him from the injury that occurred. Related to this issue is whether Lueder maintained control over Eastlick's workplace and whether Lueder breached any of its nondelegable duties to Eastlick by failing to provide a safe place to work, violating a statute or rule of law, or violating its duty of due care if Eastlick's work involved a special risk.

[3,4] Whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular case. *Didier v. Ash Grove Cement Co.*, 272 Neb. 28, 718 N.W.2d 484 (2006). When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusions reached by the trial court. *Id.*

Lueder was the general contractor on the jobsite pursuant to a written construction contract with the owner. The contract provided that Lueder was required to supervise and direct the work at the site; that the contractor was responsible to the owner for acts and omissions of the contractor's employees, subcontractors, and their agents or employees; and that the contractor was responsible for initiating, maintaining, and supervising all safety precautions and programs. The subcontract between Lueder and Monona included a provision that the subcontractor, Monona, agreed to assume the entire responsibility and liability for all damages or injury to all persons arising out of or resulting from the execution of the work provided for in the subcontract.

[5,6] Generally, one who employs an independent contractor is not liable for physical harm caused to another by the acts or omissions of the contractor or his servants. *Id.* There are two recognized exceptions to the general rule which may allow the employer of an independent contractor to be held vicariously liable to a third party. "Those two exceptions are where (1) the employer retains control over the contractor's work or (2) the employer has a nondelegable duty to protect another from harm." *Id.* at 34, 718 N.W.2d at 490. Nondelegable duties include (1) the duty of an owner in possession and control of premises to provide a safe place for work by an independent contractor's employee, (2) a duty imposed by statute or rule of law, and (3) the duty of due care when the independent contractor's work involves special risks or dangers. See *id.*

The contract between Lueder and Monona required that Monona assume the entire responsibility and liability for any injury to any person arising out of the work done by Monona. There was no evidence that Lueder had control over the work being done by Eastlick. Although Lueder had control of the jobsite, it did not control Eastlick's work or the tools and scaffolding that he was using.

There is no dispute that the scaffolding was owned, maintained, erected, and dismantled by Monona. It was intended for use by Monona and its employees. Although Lueder had a supervising role, it did not direct the masonry work done by Monona, nor did it have control over the manner in which the

masonry work was done. There was no evidence that Lueder had control over the work performed by Monona.

[7,8] Eastlick argues that Lueder owed a nondelegable duty to him to keep the premises in a reasonably safe condition. "A nondelegable duty means that an employer of an independent contractor, by assigning work consequent to a duty, is not relieved from liability arising from the delegated duties negligently performed." *Dellinger v. Omaha Pub. Power Dist.*, 9 Neb. App. 307, 311-12, 611 N.W.2d 132, 137 (2000), citing *Parrish v. Omaha Pub. Power Dist.*, 242 Neb. 783, 496 N.W.2d 902 (1993). Liability for breach of a nondelegable duty is an exception to the general rule that one who employs an independent contractor is not liable for the independent contractor's negligence. *Dellinger v. Omaha Pub. Power Dist., supra.*

Lueder has not disputed that it had a nondelegable duty to provide a safe place to work for Monona employees. The record shows that Eastlick was not injured because the workplace was unsafe. Rather, he was injured when he removed a brace on the scaffolding in an incorrect manner. The scaffolding was owned, erected, and maintained by Monona, Eastlick's employer, and not by Lueder, the general contractor. There was no evidence presented to show that Lueder breached any nondelegable duty to provide a safe workplace.

Eastlick also argues that Lueder was negligent by statute or rule of law because OSHA regulations provide that Lueder should have ensured that Eastlick had proper training to work on the scaffolding. He also claims that the court cannot infer that Lueder did not violate an OSHA standard because Lueder was not cited by OSHA.

As the district court noted, there was no dispute in the evidence that the scaffolding was owned and erected by Monona and that Monona was cited for OSHA violations. There was no evidence that Lueder was cited for any OSHA violation. The court stated that Nebraska statutes pertaining to scaffolding place the responsibility for proper erection and dismantling of scaffolding on the company that owns and maintains the scaffolding in use. See Neb. Rev. Stat. §§ 48-425 and 48-428 (Reissue 2004). The Nebraska statutes pertaining to scaffolding safety have been applied by this court to persons who erect,

construct, or supply the scaffolding. See *Hand v. Rorick Constr. Co.*, 190 Neb. 191, 206 N.W.2d 835 (1973). The district court found no support for an action for negligence against Lueder by rule of law or statute, and we agree.

[9] Eastlick also argues that the overwhelming weight of the evidence supports a finding that the acts of moving and dismantling scaffolding involve special risks or dangers, which imposed a duty of due care on Lueder. A peculiar risk must involve some special hazard resulting from the nature of the work done, which calls for special precautions. *Dellinger v. Omaha Pub. Power Dist., supra*.

Examples of types of work which this court has previously held to demonstrate peculiar risks include steel construction work (*Parrish v. Omaha Pub. Power Dist., supra*), painting the inside of an underground tank creating highly combustible paint fumes (*Anderson v. Nashua Corp.*, 246 Neb. 420, 519 N.W.2d 275 (1994)), and steamfitter work near the opening on a floor deck that exposed vertical reinforcing rods (*Simon v. Omaha P. P. Dist.*, 189 Neb. 183, 202 N.W.2d 157 (1972)).

In *Dellinger v. Omaha Pub. Power Dist.*, 9 Neb. App. 307, 611 N.W.2d 132 (2000), the Nebraska Court of Appeals distinguished cases in which an injury can be traced to an act of negligence, such as the failure to fasten one end of a board on a scaffoldlike structure, from those in which a peculiar risk is associated with the work being done. Although there may have been peculiar risks associated with the steel construction work the employee was doing, the actual risk he faced was the result of a failure to properly secure a piece of equipment.

The case at bar is similar. The injury Eastlick sustained was not the result of merely working on the scaffolding, but was the result of a failure to follow proper procedures. There was no evidence that the acts of erecting, repairing, or dismantling the scaffolding carried with them a peculiar risk, although certain safety precautions were necessary. The record does not show that the district court erred in finding that the peculiar risk doctrine did not apply to the facts of this case. There is no evidence that Lueder breached any nondelegable duty arising as a result of any peculiar risk associated with Eastlick's work on the scaffolding.

Eastlick relies on *Parrish v. Omaha Pub. Power Dist.*, 242 Neb. 783, 496 N.W.2d 902 (1993), in which this court reversed the award of summary judgment granted to the owner and the general contractor. However, in that case, the owner of the construction site specifically retained the right to inspect all work, the right to monitor overall progress of the work, and the right to take over the construction if the general contractor failed to perform the work according to the contract. A licensed professional engineer who worked for the owner was stationed at the site for daily contact with the work. He exerted some supervisory control over the construction. The project manager for Omaha Public Power District was involved in coordinating and supervising the work of the general contractor throughout the construction. This court noted that the district's personnel at the construction site were active participants and not just passive observers.

Hand v. Rorick Constr. Co., 190 Neb. 191, 206 N.W.2d 835 (1973), is more applicable to the case at bar. An employee of a masonry subcontractor sued a general contractor for injuries the employee sustained in a fall from a scaffold. The contract between the owner and the general contractor provided that the contractor would take all necessary precautions for the safety of employees.

[10] This court noted that the instrumentality which caused the injury was not the premises, but, rather, was the equipment owned, controlled, and erected by the subcontractor, who was the employer of the injured worker. The evidence did not establish that the general contractor had any right to control the instrumentalities used by the subcontractor. We held that "the duty of a general contractor to employees of a subcontractor extends only to providing a reasonably safe place to work as distinguished from apparatus, tools, or machinery furnished by the subcontractor for the use of his own employees." *Id.* at 197, 206 N.W.2d at 838.

"[A] general contractor's mere failure to inspect a scaffold owned, erected, and controlled by the subcontractor and furnished by the subcontractor for the use of his own employees does not make the general contractor liable to the subcontractor's employees for injuries caused by defects in the scaffold."

Id. at 197, 206 N.W.2d at 838-39. A contractual provision stating that the general contractor would take all necessary precautions for the safety of employees working on the jobsite did not enlarge the common-law duty of the general contractor to a subcontractor's employees such that the general contractor would be required to inspect tools, equipment, and apparatus furnished by the subcontractor for the exclusive use of its own employees. *Id.*

In the present case, the record shows that Eastlick was injured after he and Stout climbed the scaffolding to change a brace. Eastlick removed the brace before its replacement had been fastened, and the scaffolding fell to the ground. Gegzna, a foreman for Monona, Eastlick's employer, testified that Lueder did not recommend the type of scaffolding, provide instructions on its setup or dismantling, or direct Monona as to the tools to be used. Schiltz, a field supervisor for Monona, stated that the scaffolding was owned by Monona. Lueder did not deliver or make repairs to the scaffolding and had no part in its erection. It was Schiltz who directed Eastlick and Stout to repair the scaffolding. Eastlick had experience working with the scaffolding and frequently helped with repairs or replacement. Schiltz found it "unbelievable" that employees with the experience of Eastlick and Stout would attempt to change the brace without first replacing it.

Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Papillion Rural Fire Prot. Dist. v. City of Bellevue, ante* p. 214, 739 N.W.2d 162 (2007). In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Id.*

We have reviewed the evidence in a light most favorable to Eastlick and given him the benefit of all reasonable inferences deducible from the evidence. We find that there was no genuine issue of material fact as to whether Lueder owed any nondelegable duty to Eastlick beyond providing a safe place to work.

Eastlick's injuries were not the result of an unsafe premises, but, rather, the result of work completed in a negligent manner. Thus, the evidence supports the district court's finding that Lueder was entitled to summary judgment.

CONCLUSION

The judgment of the district court is affirmed.

AFFIRMED.

McCORMACK, J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
JEFFREY HESSLER, APPELLANT.
741 N.W.2d 406

Filed November 30, 2007. No. S-05-629.

1. **Pleas: Appeal and Error.** A trial court is given discretion as to whether to accept a guilty plea; an appellate court will overturn that decision only where there is an abuse of discretion.
2. **Trial: Juries: Appeal and Error.** The retention or rejection of a venireperson as a juror is a matter of discretion with the trial court and is subject to reversal only when clearly wrong.
3. **Venue: Appeal and Error.** A motion for change of venue is addressed to the discretion of the trial judge, whose ruling will not be disturbed absent an abuse of discretion.
4. **Constitutional Law: Statutes: Appeal and Error.** The constitutionality of a statute is a question of law, regarding which the Nebraska Supreme Court is obligated to reach a conclusion independent of the determination reached by the trial court.
5. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction.
6. **Right to Counsel: Waiver: Appeal and Error.** In determining whether a defendant's waiver of counsel was voluntary, knowing, and intelligent, an appellate court applies a "clearly erroneous" standard of review.
7. **Criminal Law: Pleas.** A criminal defendant has no absolute right to have his or her plea of guilty or nolo contendere accepted even if the plea is voluntarily and intelligently made.
8. **Judges: Words and Phrases.** A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving

a litigant of a substantial right and denying a just result in matters submitted for disposition.

9. **Double Jeopardy: Prior Convictions.** The use of a prior offense to prove an aggravating circumstance under Neb. Rev. Stat. § 29-2523(1)(a) (Cum. Supp. 2006) does not increase the penalty for the prior offense and does not expose the defendant to new jeopardy for such offense. Because the use of evidence of a prior offense to prove an aggravating circumstance under § 29-2523(1)(a) does not expose the defendant to new jeopardy for the prior offense, such use does not violate the Double Jeopardy Clause.
10. **Jurors: Appeal and Error.** The erroneous overruling of a challenge for cause will not warrant reversal unless it is shown on appeal that an objectionable juror was forced upon the challenging party and sat upon the jury after the party exhausted his or her peremptory challenges.
11. **Trial: Juries.** In decisions regarding challenges to potential jurors, deference to the trial court is appropriate because it is in a position to assess the demeanor of the venire, and of the individuals who compose it, a factor of critical importance in assessing the attitude and qualifications of potential jurors.
12. **Right to Counsel: Waiver.** The two-part inquiry into whether a court should accept a defendant's waiver of counsel is, first, a determination that the defendant is competent to waive counsel and, second, a determination that the waiver is knowing, intelligent, and voluntary.
13. **Trial: Mental Competency: Pleas: Right to Counsel: Waiver.** A court is not required to make a competency determination in every case in which a defendant seeks to plead guilty or to waive his or her right to counsel. As in any criminal case, a competency determination is necessary only when the court has reason to doubt the defendant's competence.
14. **Sentences: Rules of Evidence.** The sentencing phase is separate and apart from the trial phase, and the traditional rules of evidence may be relaxed following conviction so that the sentencing authority can receive all information pertinent to the imposition of sentence.
15. **Courts: Sentences: Rules of Evidence.** A sentencing court has broad discretion as to the source and type of evidence and information which may be used in determining the kind and extent of the punishment to be imposed, and evidence may be presented as to any matter that the court deems relevant to the sentence.
16. **Death Penalty: Records.** The sentencing court, in imposing the death penalty, has the statutory authority to consider the trial record.
17. **Sentences: Death Penalty: Aggravating and Mitigating Circumstances: Appeal and Error.** Proportionality review under Neb. Rev. Stat. § 29-2521.03 (Reissue 1995) looks only to other cases in which the death penalty has been imposed and requires the Nebraska Supreme Court to compare the aggravating and mitigating circumstances of a case with those present in other cases in which the death penalty was imposed, and ensure that the sentence imposed in a case is no greater than those imposed in other cases with the same or similar circumstances.

Appeal from the District Court for Scotts Bluff County: RANDALL L. LIPPSTREU, Judge. Affirmed.

James R. Mowbray and Jeffery A. Pickens, of Nebraska Commission on Public Advocacy, for appellant.

Jon Bruning, Attorney General, and J. Kirk Brown for appellee.

WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ., and HANNON, Judge, Retired.

MILLER-LERMAN, J.

I. NATURE OF CASE

Jeffrey Hessler was convicted in the district court for Scotts Bluff County of first degree murder, kidnapping, first degree sexual assault on a child, and use of a firearm to commit a felony. Following Hessler's conviction for first degree murder, the jury found that three statutory aggravating circumstances existed. After the convictions and findings of aggravating circumstances but prior to sentencing, the court granted Hessler's pro se request to waive counsel for the remainder of the case. Hessler appeared pro se at the sentencing proceeding. In its sentencing order, the sentencing panel accepted the jury's verdicts finding that three statutory aggravating circumstances existed. The panel further concluded that no statutory or nonstatutory mitigating factors were established, that mitigating factors did not approach or exceed the weight of the aggravating circumstances, and that a death sentence would not be excessive or disproportionate to sentences previously imposed in similar circumstances. The panel therefore sentenced Hessler to death for first degree murder; to life imprisonment without parole for kidnapping; to 40 to 50 years' imprisonment for sexual assault; and to 20 to 25 years' imprisonment for the firearms conviction, with each sentence to be served consecutively to the others.

This automatic appeal followed. After Hessler filed a pro se brief assigning no error, we appointed counsel to represent Hessler on appeal. Appointed counsel filed a brief assigning various errors with respect to the guilt, aggravation, and sentencing phases of the trial. We affirm Hessler's convictions and sentences.

II. STATEMENT OF FACTS

On the morning of February 11, 2003, 15-year-old Heather Guerrero left her home in Gering, Nebraska, to make deliveries on her newspaper route. Heather never returned home. A search was conducted, and on the morning of February 12, Heather's body was found in the basement of an abandoned house near Lake Minatare, Nebraska.

During the investigation of Heather's disappearance, a witness who was walking his dog on the morning of February 11, 2003, reported that he had heard a scream and had seen a silver or tan Nissan Altima drive by at a high rate of speed. A car matching that description belonged to a friend of Hessler's who had allowed Hessler to drive the car. A search of the car revealed three boxes of live ammunition, some spent casings, and Hessler's wallet. After police questioned Hessler, Hessler gave police his semiautomatic handgun. In response to interrogation, Hessler admitted to having sex with Heather but asserted that it was consensual. Hessler said that after Heather indicated she would not keep the encounter secret, he "freaked out," took her to the basement of the abandoned house, and shot her.

On February 26, 2003, the State filed an information charging Hessler with five counts in connection with the death of Heather: count I, premeditated murder; count II, felony murder; count III, kidnapping; count IV, first degree sexual assault; and count V, use of a firearm to commit a felony. In connection with counts I and II, the State gave notice of aggravating circumstances and alleged that under Neb. Rev. Stat. § 29-2523 (Cum. Supp. 2006), (1) Hessler had a substantial prior history of serious assaultive or terrorizing criminal activity (§ 29-2523(1)(a)); (2) the murder was committed in an effort to conceal the commission of the crimes of the kidnapping and sexual assault of Heather and the sexual assault of another girl, J.B. (§ 29-2523(1)(b)); and (3) the murder was especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence (§ 29-2523(1)(d)).

On May 19, 2003, Hessler made an oral motion to plead guilty to count II, felony murder, and to count IV, first degree sexual assault. The court responded that it would deny the motion until it had time to research the issue. Hessler filed a written motion to plead guilty on June 4, and a hearing was held June 18. The court denied the motion in an order dated July 25. The court stated that Hessler did not have an absolute right to have his plea accepted and that accepting the plea would cause more uncertainty than finality because both counts I and II charged Hessler with first degree murder and accepting a plea on one of the counts would create confusion as to whether trial was necessary or permitted on the other count. Hessler attempted to appeal the July 25 order, but this court dismissed the appeal for lack of jurisdiction. *State v. Hessler*, 267 Neb. xxii (No. S-03-967, Feb. 11, 2004).

On April 9, 2004, Hessler filed a motion to plead guilty to the count of felony murder and to all remaining counts other than premeditated murder. A hearing on the motion was scheduled for April 14. On that day, the State filed a motion to dismiss the count of felony murder. At the hearing, the court first considered the State's motion to dismiss. The court sustained the motion to dismiss the count of felony murder and then denied Hessler's motion to plead guilty to that count. Hessler declined to plead guilty to the remaining counts. Hessler attempted to appeal the April 14 order, but this court again dismissed the appeal. *State v. Hessler*, 268 Neb. xxiv (No. S-04-497, Sept. 1, 2004), *cert. denied* 543 U.S. 1161, 125 S. Ct. 1320, 161 L. Ed. 2d 131 (2005).

On October 6, 2004, Hessler filed a plea in bar in which he asserted that he had previously been convicted and sentenced for an offense relating to another victim which he claimed was an element of the capital murder charge set forth in this case. During the investigation of the death of Heather, police linked Hessler to the August 20, 2002, sexual assault of J.B., who, like Heather, was a teenage girl who was delivering newspapers at the time she was assaulted. The State charged Hessler in connection with the sexual assault of J.B. After the crimes were committed and the charges filed in the instant case, on July 14, 2003, Hessler pled no contest to first degree sexual assault of

J.B. Hessler was sentenced on August 21 to imprisonment for 30 to 42 years for the sexual assault of J.B. He did not appeal the conviction or sentence. In the plea in bar filed in this case, Hessler asserted that the Double Jeopardy Clause barred use of the sexual assault of J.B. to prove an aggravating circumstance in the present case because such use would subject him to a second prosecution and punishment for the sexual assault of J.B. On November 17, 2004, the court overruled Hessler's plea in bar. Hessler attempted to appeal the denial, but on November 24, we dismissed the appeal for lack of jurisdiction. *State v. Hessler*, 268 Neb. xxv (No. S-04-1304, Nov. 24, 2004).

Jury selection in Hessler's trial began November 29, 2004. Jury summonses had been sent to 250 people, and potential jurors were sent a supplemental questionnaire which asked, inter alia, whether the potential juror had formed an opinion about Hessler's guilt or innocence and the basis for such opinion. The venire included 107 potential jurors. The court excused 65 potential jurors, leaving 42 potential jurors upon whom the parties could exercise peremptory challenges. Hessler made motions to excuse six potential jurors for cause. The court overruled the motions after questioning the potential jurors regarding, inter alia, whether they could set aside their opinions and render impartial verdicts. Hessler later used peremptory challenges to remove four of the potential jurors he had sought to excuse, and the State used a peremptory challenge to remove one.

Only one of the six potential jurors that Hessler moved to excuse became a member of the jury. That juror was R.C.F. In response to questioning by the court and by Hessler, R.C.F. stated that he had formed the opinion that Hessler was guilty based on newspaper reports. R.C.F. initially stated, "I do not presume that he's innocent, no, sir." However, R.C.F. stated in response to questioning from the court that his opinion was not so strong that he could not set it aside and take an oath to render a fair and impartial verdict based solely upon the evidence presented at trial and the instructions given by the court. In reply to a question from Hessler's counsel, R.C.F. responded that Hessler did not need to prove his innocence and stated: "If I felt without a shadow of a doubt that he was guilty I would

say so but I would not . . . Hessler does not prove that he's innocent or guilty, I realize that comes from the State, not from [the defense]." R.C.F. also stated:

> I believe in the death penalty but I also believe in a fair and impartial trial and I can set aside those feelings and those opinions and listen to the facts.
>
> . . . .
>
> . . . [I]f the facts are such that the death penalty is not warranted, then I could be very fair and impartial.

Following examination of the venire but before the exercise of peremptory challenges, Hessler made an oral motion to change venue. Hessler asserted that he could not receive a fair trial in Scotts Bluff County and argued that his assertion was supported by responses to questionnaires indicating that a large number of potential jurors had formed the opinion that he was guilty. The court overruled the motion to change venue.

At trial, a videotape of the February 12, 2003, interrogation of Hessler was played to the jury. Other evidence at trial included, inter alia, testimony of a firearms examiner who opined that Hessler's gun fired the cartridge found near Heather's body, testimony of a medical technologist who testified that DNA testing could not exclude Heather as a contributor to DNA found on Hessler's clothing and in the car Hessler was using, and testimony of a doctor who performed an autopsy on Heather's body and who testified that a gunshot wound to the head caused her death and that injuries to her vaginal area could be consistent with either forcible penetration or consensual sex. On December 7, 2004, the jury returned verdicts of guilty on the counts of first degree murder, kidnapping, first degree sexual assault, and use of a firearm to commit a felony.

Following the verdicts, and prior to and during the aggravation hearing, Hessler filed various motions, including, inter alia, motions to declare the Nebraska death penalty statutes unconstitutional on various bases, a motion based on double jeopardy grounds to prohibit the State from presenting evidence at the aggravation hearing regarding the sexual assault of J.B. and from seeking a verdict on the aggravating circumstance found in § 29-2523(1)(a) based on such evidence, and a motion for a jury instruction at the aggravation hearing requiring the jury

to make unanimous, written findings of fact in support of any aggravating circumstances the jury found to exist. Although Hessler later waived counsel, Hessler was represented by counsel in connection with the court's consideration of his various motions, including his constitutional challenge to the death penalty statutes, his Double Jeopardy challenge involving J.B., and his jury instruction request. The court overruled the motions. At the aggravation hearing, the State presented, inter alia, evidence of the sexual assault of J.B. On December 9, 2004, the jury found that all three aggravating circumstances alleged by the State existed.

On March 31, 2005, Hessler filed a pro se motion titled "Motion to Invoke My Sixth-Amendment Right and to Expurgate the Advocate of the State and to Delineate Myself." The court had a hearing scheduled to consider various motions filed by counsel on the day Hessler filed his pro se motion. At the hearing, the court first considered Hessler's pro se motion. After questioning Hessler, the court determined that by the motion, Hessler sought to remove his counsel, waive his right to counsel, and appear pro se at sentencing. The court then questioned Hessler about his "current status and mental abilities" which included questions regarding his age, his education, and his understanding of the proceedings. In response to the questions, Hessler indicated that he had been prescribed unspecified "antipsychotics" and "antihypnotic" drugs but that he had not taken his medications that particular day. The court further questioned Hessler regarding his understanding of his right to counsel, of what he would forgo if he waived his right to counsel, and of what would be required of him in order to represent himself in further proceedings. In response to questions regarding his ability to represent himself against the State, which would be represented by attorneys, Hessler said, "I've got God on my side, God's guiding me. . . . I just go by what God tells me." He also indicated that he was not concerned "because [his] wishes are the same as the State." Hessler further indicated that although he was not generally dissatisfied with his counsel's performance, he wanted to represent himself because counsel "refuse[d] to comply with [his] wishes." Following such questioning, the court found that Hessler had "knowingly,

intelligently, [and] voluntarily decided to represent himself in this case." The court nevertheless instructed counsel to prepare for the sentencing hearing and to be on standby at sentencing in the event that Hessler changed his mind and wished to consult with counsel. Although Hessler indicated his intent to withdraw various motions made by counsel, including a motion challenging electrocution as a method of execution, the court allowed counsel to present evidence in support of such motions in order to make a complete record.

On May 16, 2005, the sentencing proceeding was held before a sentencing panel that included the trial judge and two other judges. Hessler appeared pro se but his former counsel was present on standby. At the beginning of the hearing, the presiding judge again questioned Hessler regarding his decision to appear pro se. Hessler indicated that he still wanted to appear pro se, that he understood his right to counsel and the consequences of proceeding without counsel, and that no one had made promises or threats or done anything to get him to waive counsel. The court again stated its finding that Hessler knowingly, intelligently, and voluntarily waived his right to counsel but told Hessler that he could inform the court if at any time he wished to be assisted by standby counsel.

At the sentencing hearing, Hessler offered into evidence, and the court received, a document signed by Hessler titled "Interlocutory Statement of the Defendant." In the document, Hessler requested the sentencing panel "to bring the Justice and Wrath of GOD onto myself." He further requested that "the True Intentions of This Court follows GOD'S COMMANDS and My Wishes and that is to ONLY to be the following . . . . I, JEFFREY ALAN HESSLER , MUST BE PUT TO DEATH WITHOUT DIALECTIC."

The document continued for several more pages in which Hessler discussed his remorse for the death of Heather, his opinion that death was the proper punishment, his feelings regarding the progress of the trial, and his life in general. Hessler offered no other evidence which would bear on mitigating circumstances or other factors to be considered in connection with sentencing.

The State asked the court "to take judicial notice of all the exhibits that were received at trial and the aggravation hearing

as well." The court had previously received into evidence "a two volume transcript of the proceedings of both the trial and the aggravation hearing," and the court stated that it would "make all the exhibits from the two proceedings available for the three-judge panel for their consideration and deliberations." The State offered no further evidence. Hessler declined to make a closing statement in his own behalf. The State made a closing statement in which it urged the panel to impose a death sentence for first degree murder and to impose the maximum sentences on the other counts. Hessler declined to rebut the State's closing statement. The court informed Hessler that he had a "final opportunity to make a statement to the court" regarding anything he wanted the court to consider. Hessler declined to make a statement.

Later that day, the sentencing panel announced its decision and entered its sentencing order. The panel recited the relevant facts and, finding the facts true beyond a reasonable doubt, unanimously accepted the jury's verdicts. The panel next found that the three asserted aggravating circumstances existed beyond a reasonable doubt and unanimously accepted the jury's findings regarding aggravating circumstances. The panel then considered mitigating circumstances but unanimously concluded that no statutory and no nonstatutory mitigating factors were established in this case. The panel further unanimously concluded beyond a reasonable doubt that an imposition of death would not be excessive or disproportionate to sentences previously imposed in similar circumstances. The panel finally unanimously concluded that (1) aggravating circumstances justified imposition of a death sentence; (2) mitigating circumstances did not approach or exceed the weight given to aggravating circumstances; and (3) a death sentence would not be excessive or disproportionate to penalties imposed in similar cases, considering both the crime and the defendant. The panel imposed sentences of death for first degree murder, life imprisonment without parole for kidnapping, imprisonment for 40 to 50 years for first degree sexual assault on a child, and imprisonment of 20 to 25 years for use of a firearm to commit a felony. The panel ordered that each sentence be served consecutively to the others.

This automatic appeal followed.

III. ASSIGNMENTS OF ERROR

On August 9, 2005, Hessler filed a pro se appellant's brief in which he assigned no error. Instead, in the brief, Hessler repeated much of the content of the document he entered into evidence at the sentencing hearing. A replacement brief order was issued by the Clerk of the Supreme Court, and in response, Hessler informed this court that he did not want nor did he file this appeal and that he would not file any more briefs or other statements. This court on September 28, 2005, appointed counsel to represent Hessler in this automatic appeal. Counsel subsequently filed an appellant's brief on Hessler's behalf.

Hessler, through counsel, asserts that the district court erred in (1) denying his motions to plead guilty to felony murder; (2) violating the Double Jeopardy Clause by allowing the State to use the sexual assault of J.B. to prove an aggravating circumstance; (3) failing to excuse for cause potential jurors who had formed opinions regarding Hessler's guilt; (4) overruling his motion to change venue; (5) overruling his motion to declare Nebraska death penalty statutes unconstitutional on various bases, including (a) vagueness of aggravating circumstances described in § 29-2523(1)(a), (b), and (d); (b) failure to require or allow the jury to determine mitigating circumstances, to assign a weight to aggravating circumstances, and to determine the sentence; and (c) unconstitutionally penalizing a defendant's exercise of the right to a jury trial on aggravating circumstances; (6) denying his request for an instruction in the aggravation phase requiring the jury to make unanimous, written findings of fact to support each aggravating circumstance found to exist; (7) granting his request to waive counsel and appear pro se at sentencing and failing to make a determination regarding his competency to waive counsel; and (8) receiving into evidence at sentencing the records of the guilt and aggravation phases of the trial.

IV. STANDARDS OF REVIEW

[1] A trial court is given discretion as to whether to accept a guilty plea; this court will overturn that decision only where

there is an abuse of discretion. *State v. Brown*, 268 Neb. 943, 689 N.W.2d 347 (2004).

[2] The retention or rejection of a venireperson as a juror is a matter of discretion with the trial court and is subject to reversal only when clearly wrong. *State v. Quintana*, 261 Neb. 38, 621 N.W.2d 121 (2001).

[3] A motion for change of venue is addressed to the discretion of the trial judge, whose ruling will not be disturbed absent an abuse of discretion. *State v. Rodriguez*, 272 Neb. 930, 726 N.W.2d 157 (2007).

[4] The constitutionality of a statute is a question of law, regarding which the Nebraska Supreme Court is obligated to reach a conclusion independent of the determination reached by the trial court. *State v. Marrs*, 272 Neb. 573, 723 N.W.2d 499 (2006).

[5] To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction. *State v. Blair*, 272 Neb. 951, 726 N.W.2d 185 (2007).

[6] In determining whether a defendant's waiver of counsel was voluntary, knowing, and intelligent, an appellate court applies a "clearly erroneous" standard of review. *State v. Gunther*, 271 Neb. 874, 716 N.W.2d 691 (2006).

V. ANALYSIS

1. No Abuse of Discretion in Denial of Motions to Plead Guilty to Felony Murder

In his first assignment of error, Hessler asserts that the district court erred when it denied his motions to plead guilty to the felony murder count. Although the assignment of error mentions the granting of the State's motion to dismiss the felony murder count, Hessler makes no specific argument regarding the dismissal. We therefore treat the assignment of error as limited to the denial of Hessler's motions to plead guilty to felony murder. See *In re Interest of Michael U.*, 273 Neb. 198, 728 N.W.2d 116 (2007) (errors assigned but not argued will not be

addressed by appellate court). A trial court is given discretion as to whether to accept a guilty plea; this court will overturn that decision only where there is an abuse of discretion. *Brown, supra*. We conclude that the court did not abuse its discretion when it denied Hessler's motions to plead guilty to felony murder.

As noted above, the State originally charged Hessler with both premeditated murder and felony murder and denominated the two as separate counts in the information. Hessler twice moved the court to allow him to plead guilty to felony murder, and the court denied both motions. In its order denying Hessler's first motion to plead guilty, the court noted that if the plea to felony murder were accepted, there would be confusion as to whether Hessler should thereafter also be tried for premeditated murder. The court determined that accepting the plea "would create more uncertainty than finality, would not eliminate the need for a full trial of the facts either at the evidentiary phase or the sentencing phase, and would not significantly save costs or court time."

Hessler asserts that the court's reasons are clearly untenable. He argues that the State assumed the risk of his pleading to one count when it charged premeditated murder and felony murder as separate counts and that the court acted as a safety net and unfairly assisted the prosecution by saving it from this tactical error. Hessler asserts that he had valid reasons to plead guilty to felony murder, including a strategy to avoid the death penalty, his feelings of remorse and desire to accept responsibility for the crime, and a desire to spare his family and the victim's family the emotional trauma of a trial.

[7,8] With regard to whether courts must accept a defendant's plea of guilty, we have stated:

> It is well established that a criminal defendant has no absolute right to have his or her plea of guilty or nolo contendere accepted even if the plea is voluntarily and intelligently made. . . . Our cases recognize that a trial court has a large measure of discretion in deciding whether to accept a guilty plea.

State v. Brown, 268 Neb. 943, 947, 689 N.W.2d 347, 351 (2004) (citations omitted). We stated in *Brown* that our jurisprudence

grants trial courts "wide discretion in rejecting plea agreements for substantive reasons." 268 Neb. at 950, 689 N.W.2d at 352. This court will overturn a decision on whether to accept a plea of guilty only where there is an abuse of discretion. *Id*. A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition. *State v. Davlin*, 272 Neb. 139, 719 N.W.2d 243 (2006).

Although we do not necessarily agree with each substantive reason recited by the court, we find no abuse of discretion in the decision to deny the motions to plead guilty to felony murder. Hessler had no absolute right to plead guilty, see *Brown, supra*, and therefore, the ruling did not deprive him of a substantial right. Nor did the ruling deny Hessler a just result. Hessler argues that his desire to plead guilty to felony murder was part of a strategy to avoid the death penalty. However, felony murder and premeditated murder are both theories of first degree murder subject to the death penalty. See *State v. Nesbitt*, 264 Neb. 612, 633, 650 N.W.2d 766, 785 (2002) ("premeditated murder and felony murder are simply alternate methods of committing first degree murder"). Had Hessler pled guilty to felony murder, he still would have stood convicted of first degree murder and the death penalty still would have been a possible sentence. Also, a plea to felony murder would not necessarily have spared Hessler's family and the victim's family the emotional trauma of a trial on other counts. With the death penalty still a possible sentence, trial still would have been required on the aggravating circumstances, and the sentencing panel still would have been required to consider the circumstances of the crime. The State likely would have presented much of the evidence it presented in the guilt phase of the trial at the aggravation and sentencing phases if Hessler had been allowed to plead.

Because the denial did not deprive Hessler of a substantial right or a just result, we conclude that the court's denial of Hessler's motions to plead guilty to felony murder was within the court's "wide discretion." See *Brown, supra*. We reject Hessler's first assignment of error.

2. No Double Jeopardy Violation in Use of Prior Sexual Assault of Another Victim to Prove Aggravating Circumstance

In his second assignment of error, Hessler asserts that the district court erred in various rulings. As Hessler argues this assignment of error, his general claim is that the court erred in allowing the State to use his prior sexual assault of J.B. to prove the aggravating circumstance of § 29-2533(1)(a), prior history of serious assaultive criminal activity, and that such use subjected him to a second punishment for that crime in violation of the Double Jeopardy Clause. We conclude that use of the prior sexual assault of J.B. to prove an aggravating circumstance did not violate the Double Jeopardy Clause.

Hessler argues that as the crime in the present case was charged, the sexual assault of J.B. was an element of the offense of capital murder, and that it violated the Double Jeopardy Clause to use the prior assault, for which he had already been tried and punished, as an element of another crime. In support of his argument, Hessler cites two U.S. Supreme Court cases, *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), and *Sattazahn v. Pennsylvania*, 537 U.S. 101, 123 S. Ct. 732, 154 L. Ed. 2d 588 (2003). In *Ring*, the U.S. Supreme Court, in holding that the Sixth Amendment requires that aggravating circumstances be found by a jury, stated that "aggravating factors operate as 'the functional equivalent of an element of a greater offense.'" 536 U.S. at 609 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)). In *Sattazahn*, three justices of the Court cited and quoted *Ring* and stated that "for purposes of the Sixth Amendment's jury-trial guarantee, the underlying offense of 'murder' is a distinct, lesser included offense of 'murder plus one or more aggravating circumstances.'" 537 U.S. at 111. In determining whether the Double Jeopardy Clause applied to capital sentencing proceedings to determine the existence of aggravating circumstances, the three justices found no reason to distinguish between what constitutes an offense for Sixth Amendment jury purposes and what constitutes an offense for Fifth Amendment double jeopardy purposes. *Id.* Hessler argues

that these statements in *Ring* and *Sattazahn* mean that aggravating circumstances are elements of the offense of capital murder and that therefore, the sexual assault of J.B., which was alleged as an aggravating circumstance, was a lesser-included offense of the capital murder of Heather.

We note initially that the Nebraska Legislature has provided that "the aggravating circumstances are not intended to constitute elements of the crime generally unless subsequently so required by the state or federal constitution." Neb. Rev. Stat. § 29-2519(2)(d) (Cum. Supp. 2006). We do not believe that the explanatory comments in *Ring* and *Sattazahn* lead to the conclusion that an aggravating circumstance should be treated as an element of capital murder, and we reject Hessler's suggestion that we treat an aggravating circumstance as an element of capital murder. In *Ring*, the Court referred to aggravating circumstances as the "functional equivalents" of elements only for the purpose of resolving the question of whether a jury was required to find aggravating circumstances. In *Schriro v. Summerlin*, 542 U.S. 348, 124 S. Ct. 2519, 159 L. Ed. 2d 442 (2004), the Court stated that the holding in *Ring* did not alter the range of conduct that the statutes at issue subjected to the death penalty, but instead altered the method for determining whether conduct was punishable by death by requiring a jury determination of aggravating circumstances. These statements in *Schriro* indicate that the Court did not consider aggravating circumstances to be substantive elements of the crime of capital murder. Instead, the Court considered aggravating circumstances as functional equivalents of elements for the limited purpose of determining whether Sixth Amendment jury guarantees extended to findings of aggravating circumstances.

Sattazahn v. Pennsylvania, 537 U.S. 101, 123 S. Ct. 732, 154 L. Ed. 2d 588 (2003), also does not support Hessler's argument. The issue in *Sattazahn* was whether the Double Jeopardy Clause prohibited a second capital sentencing for the same crime. Three justices of the Court in *Sattazahn* stated, "If a jury unanimously concludes that a State has failed to meet its burden of proving the existence of one or more aggravating circumstances, double-jeopardy protections attach to that 'acquittal' on the offense of 'murder plus aggravating circumstance(s).'"

537 U.S. at 112. The three justices determined that double jeopardy protections would attach once a jury concluded that no aggravating circumstances existed and that therefore, a second capital sentencing would be prohibited. The Court in *Sattazahn* did not state that double jeopardy protections prohibited the use of evidence of prior crimes to establish an aggravating circumstance in a subsequent case involving a different crime. Furthermore, the portions of *Sattazahn* on which Hessler relies were from a section of the opinion that was joined by only three justices, and the views expressed by the three were not endorsed by a majority of the Court. See *State v. Mata*, 266 Neb. 668, 668 N.W.2d 448 (2003) (rejecting similar argument based on *Sattazahn*).

The issue in the present case is different from those in *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), and *Sattazahn, supra*. The issue here is whether evidence of a prior offense can be used to prove prior history as an aggravating circumstance in a capital trial involving a later offense. This question is more similar to the question of whether the sentence for a subsequent crime may be enhanced based on prior crimes. In *Witte v. United States*, 515 U.S. 389, 115 S. Ct. 2199, 132 L. Ed. 2d 351 (1995), the Court stated that the consideration of prior conduct in connection with sentencing for a subsequent offense does not result in additional punishment for such prior conduct. The Court stated that enhancement or recidivism statutes do not change the penalty imposed for the earlier offense and stated:

> In repeatedly upholding such recidivism statutes, we have rejected double jeopardy challenges because the enhanced punishment imposed for the later offense "is not to be viewed as either a new jeopardy or additional penalty for the earlier crimes," but instead as "a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one."

515 U.S. at 400.

[9] Under this reasoning, we determine that the use of a prior offense to prove an aggravating circumstance under § 29-2523(1)(a) does not increase the penalty for the prior offense and does not expose the defendant to new jeopardy for

such offense. Instead, the finding of an aggravating circumstance is used to increase the potential punishment for the latest crime which in the present case is first degree murder. We therefore conclude that because the use of evidence of a prior offense to prove an aggravating circumstance under § 29-2523(1)(a) does not expose the defendant to new jeopardy for the prior offense, such use does not violate the Double Jeopardy Clause.

In sum, in the present case, evidence regarding the sexual assault of J.B. was used to prove that an aggravating circumstance existed and to enhance the potential punishment for Hessler's conviction for the first degree murder of Heather. Such evidence was not used to prove a substantive element of the crime of first degree murder, and the use of such evidence did not subject Hessler to additional punishment for the sexual assault of J.B. We conclude that the use of evidence of Hessler's sexual assault of J.B. did not violate the Double Jeopardy Clause and that Hessler's second assignment of error is without merit.

3. No Reversible Error in Overruling of Motions to Excuse Jurors for Cause

In his third assignment of error, Hessler asserts that the district court erred when it overruled his motions to excuse various potential jurors for cause. The retention or rejection of a venireperson as a juror is a matter of discretion with the trial court and is subject to reversal only when clearly wrong. *State v. Quintana*, 261 Neb. 38, 621 N.W.2d 121 (2001). The court overruled Hessler's challenges with respect to six potential jurors, but in his brief, Hessler makes arguments with respect to only five of the six. Hessler argues that the five should have been excused for cause because each person had formed the opinion that Hessler was guilty and did not adequately demonstrate that he or she could act as an impartial juror despite such opinion. Only one of the five, R.C.F., actually became a member of the jury. Three were removed by Hessler's use of peremptory challenges, and one was removed by the State's use of a peremptory challenge. We conclude that reversal is not warranted based on those challenged individuals who did not become members of the jury and that the court did not err in overruling Hessler's motion to excuse R.C.F.

Hessler argues that each potential juror should have been struck for cause pursuant to Neb. Rev. Stat. § 29-2006(2) (Reissue 1995), which states that good cause to challenge a juror includes that "he has formed or expressed an opinion as to the guilt or innocence of the accused." Section 29-2006(2) further provides that if a potential juror has formed an opinion, the court should examine him or her regarding the grounds for such opinion. If the opinion was formed based upon "conversations with witnesses of the transactions or reading reports of their testimony or hearing them testify," dismissal is mandatory. *Id.* See, also, *State v. Myers*, 190 Neb. 466, 209 N.W.2d 345 (1973). However, if the opinion was formed based on "reading newspaper statements, communications, comments or reports, or upon rumor or hearsay," then the person may still serve if (1) the potential juror "shall say on oath that he feels able, notwithstanding such opinion, to render an impartial verdict upon the law and the evidence" and (2) the court is satisfied that the potential juror "is impartial and will render such verdict." § 29-2006(2).

[10] We have stated that "the erroneous overruling of a challenge for cause will not warrant reversal unless it is shown on appeal that an objectionable juror was forced upon the challenging party and sat upon the jury after the party exhausted his or her peremptory challenges." *State v. Quintana*, 261 Neb. at 52, 621 N.W.2d at 134. In this case, four of the five potential jurors that Hessler complains of on appeal were struck by the use of peremptory challenges. Under *Quintana*, there can be no reversal based on a challenge to a potential juror if that person was not ultimately included on the jury, even if the defendant was required to use a peremptory challenge to remove the person. Therefore, reversal is not warranted in this case based on the overruling of Hessler's challenges to those persons who did not become members of the jury.

[11] The only challenged individual who became a member of the jury was R.C.F. Although R.C.F. initially stated that he had formed an opinion regarding Hessler's guilt, R.C.F. also stated that such opinion was based on newspaper reports and that his opinion was not so strong that he could not set it aside and take an oath to render a fair and impartial verdict. Although during questioning by defense counsel, R.C.F. stated that "I do

not presume that he's innocent, no, sir," R.C.F. also said, inter alia, that "Hessler does not prove that he's innocent or guilty, I realize that comes from the State, not from [the defense]." Viewed in context, we believe that despite R.C.F.'s initial statements that he had formed an opinion and that he did not presume Hessler to be innocent, other later statements made by R.C.F. indicate he understood that as a juror, he needed to be and could be impartial, and that the State had the burden to prove Hessler guilty rather than Hessler's having the burden to prove himself innocent. We believe the court reasonably could have assessed R.C.F.'s statements and his demeanor and concluded that R.C.F. could render an impartial verdict. In this respect, we note that deference is given to a trial court's determinations in these matters. The U.S. Supreme Court recently stated that in decisions regarding challenges to potential jurors, "[d]eference to the trial court is appropriate because it is in a position to assess the demeanor of the venire, and of the individuals who compose it, a factor of critical importance in assessing the attitude and qualifications of potential jurors." *Uttecht v. Brown*, 551 U.S. 1, 9, 127 S. Ct. 2218, 167 L. Ed. 2d 1014 (2007). Based on our review of the questioning of R.C.F., and taking R.C.F.'s responses as a whole and giving proper deference to the court's assessment of R.C.F.'s demeanor, we conclude that the court was not clearly erroneous in overruling Hessler's motion to excuse R.C.F.

Reversal cannot be based on challenges to potential jurors who did not become members of the jury, and the court was not clearly wrong when it overruled the motion to excuse R.C.F. We therefore reject Hessler's third assignment of error.

4. No Error in Denial of Motion to Change Venue

In his fourth assignment of error, Hessler asserts that the district court erred in denying his request to change venue on the basis that he could not receive a fair trial in Scotts Bluff County. A motion for change of venue is addressed to the discretion of the trial judge, whose ruling will not be disturbed absent an abuse of discretion. *State v. Rodriguez*, 272 Neb. 930, 726 N.W.2d 157 (2007). We conclude that the court did not abuse its discretion when it denied Hessler's request to change venue.

Hessler did not move to change venue prior to jury selection, and he did not offer evidence regarding newspaper stories or other publicity regarding the crime. Instead, his arguments in favor of changing venue were based on voir dire examinations of potential jurors. Hessler noted that a large number of potential jurors had seen or heard reports of the crime and had formed opinions regarding Hessler's guilt. He argues on appeal that the court did not exercise sufficient care during jury selection because the court did not strike various persons for cause and because R.C.F. became a member of the jury. Hessler asserts that jury selection was complicated by the large number of persons who had formed opinions based on news reports, and he notes that many had to be excused based on such opinions. Hessler argues that the jury selection process demonstrated that "local conditions and pretrial publicity made it impossible for [him] to secure a fair and impartial jury in Scotts Bluff County," brief for appellant at 62, and that therefore, he was denied his right to an impartial jury.

In *State v. Quintana*, 261 Neb. 38, 54, 621 N.W.2d 121, 135 (2001), we noted that jurors who had heard publicity about the case "agreed that they could set aside any information that they knew about the case and that they would make decisions solely from what they heard in court." Because the record in *Quintana* showed that an impartial jury had been chosen, we concluded that the defendant had not shown that he could not receive a fair trial in the county at issue and that the court did not abuse its discretion in denying the defendant's motion to change venue.

Similar to *Quintana*, we determine that Hessler has not shown that a change of venue was necessary, because an impartial jury was in fact selected, and that Hessler therefore did not show that he could not receive a fair trial in Scotts Bluff County. As noted above, R.C.F. was the only person actually on the jury of whom Hessler complains on appeal. As we determined above, the record shows that in response to questioning, R.C.F. indicated that he could render an impartial verdict. Hessler makes no other argument that the jury was not impartial; he argues only that it was difficult to select a jury because of alleged partiality in the venire.

Because Hessler has not shown that his actual jury was partial, he has not shown that it was impossible to seat an impartial jury or that he could not receive a fair trial in Scotts Bluff County. We therefore conclude that the court did not abuse its discretion when it denied Hessler's motion for change of venue, and we reject his fourth assignment of error.

5. Death Penalty Statutes Not Shown to Be Unconstitutional

In his fifth assignment of error, Hessler asserts that the district court erred when it denied his motions to declare the Nebraska death penalty statutes unconstitutional. The constitutionality of a statute is a question of law, regarding which the Nebraska Supreme Court is obligated to reach a conclusion independent of the determination reached by the trial court. *State v. Marrs*, 272 Neb. 573, 723 N.W.2d 499 (2006). Hessler argues that the death penalty statutes are unconstitutional in various respects. He asserts first that the three statutory aggravating circumstances alleged in this case are unconstitutionally vague and indefinite. The aggravating circumstances alleged in this case were § 29-2523(1)(a), "substantial prior history of serious assaultive or terrorizing criminal activity"; § 29-2523(1)(b), "murder was committed in an effort to conceal the commission of a crime"; and § 29-2523(1)(d), murder that is "especially heinous, atrocious, [and] cruel." Hessler also asserts that the death penalty statutes are unconstitutional with respect to the limited role the statutes give the jury in capital sentencing. He specifically argues that the statutes are unconstitutional in that they fail to allow the jury to consider mitigating circumstances, to assign a weight to aggravating circumstances, and to suggest, recommend, or determine whether a death sentence or a life sentence should be given. Hessler also argues that the statutory requirement that a sentencing panel determines the sentence even when a jury determines aggravating circumstances is an unconstitutional penalty on the defendant's exercise of his or her right to a jury trial in the aggravation phase. As a matter of law, we reject each of Hessler's assertions that the Nebraska death penalty statutes are unconstitutional.

(a) Aggravating Circumstances

With respect to § 29-2523(1)(a), (b), and (d), Hessler asserts that each of these aggravating circumstances is unconstitutionally vague. We note that this court has previously rejected similar challenges regarding each of the aggravating circumstances. Challenges to § 29-2523(1)(a) were rejected in *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000); *State v. Ryan*, 248 Neb. 405, 534 N.W.2d 766 (1995); and *State v. Holtan*, 197 Neb. 544, 250 N.W.2d 876 (1977), *disapproved on other grounds, State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1986). Challenges to § 29-2523(1)(b) were rejected in *Bjorklund, supra*; *State v. Lotter*, 255 Neb. 456, 586 N.W.2d 591 (1998), *modified* 255 Neb. 889, 587 N.W.2d 673 (1999); and *State v. Moore*, 250 Neb. 805, 553 N.W.2d 120 (1996), *disapproved on other grounds, State v. Reeves*, 228 Neb. 511, 604 N.W.2d 151 (2000). And challenges to § 29-2523(1)(d) were rejected in *State v. Gales*, 269 Neb. 443, 694 N.W.2d 124 (2005); *Bjorklund, supra*; and *State v. Ryan*, 233 Neb. 74, 444 N.W.2d 610 (1989). Hessler has cited no subsequent federal or state authority that would call such rulings into question, and Hessler has not articulated any persuasive arguments why our prior reasoning is faulty or any other reason why this court should overrule such precedent. We therefore reject Hessler's arguments that the aggravating circumstances set forth in § 29-2523(1)(a), (b), and (d) are unconstitutionally vague and indefinite.

(b) Jury's Role in Capital Sentencing

Hessler's remaining arguments generally deal with the jury's role in capital sentencing. Under Nebraska death penalty sentencing statutes, after the guilt phase of the trial, the jury's only role in sentencing is to find whether aggravating circumstances exist. Pursuant to Neb. Rev. Stat. § 29-2520 (Cum. Supp. 2006), a jury determines whether aggravating circumstances exist unless the defendant waives his or her right to such a jury determination. Pursuant to Neb. Rev. Stat. § 29-2521 (Cum. Supp. 2006), after a jury has found aggravating circumstances or the defendant has waived the right to such jury determination, a panel of three judges determines the sentence, which

determination includes finding mitigating circumstances, balancing aggravating and mitigating circumstances, and conducting a proportionality review.

Hessler asserts that the death penalty statutes are unconstitutional because they do not require the jury to (1) find mitigating circumstances; (2) weigh aggravating and mitigating circumstances; or (3) suggest, recommend, or determine whether a sentence of life or a sentence of death should be imposed. Hessler argues that the statutory scheme is "irrational, unworkable, incoherent, and incapable of rendering a fair and just determination of life and death," brief for appellant at 68, because the sentencing panel, which was not the fact finder during the aggravation phase, is not in as good a position as the jury to assign a weight to the aggravating circumstances, to weigh aggravating circumstances against mitigating circumstances, and to determine the sentence.

In *State v. Gales*, 265 Neb. 598, 658 N.W.2d 604 (2003) (*Gales I*), we noted that the U.S. Supreme Court in *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), held that there is a Sixth Amendment right to have a jury determine the existence of any aggravating circumstance upon which a capital sentence is based. However, we determined in *Gales I* that the holding in *Ring* was not so broad as to require that a jury make additional determinations with regard to capital sentencing. We stated that we did not read *Ring* or other authority "to require that the determination of mitigating circumstances, the balancing function, or proportionality review be undertaken by a jury." 265 Neb. at 628-29, 658 N.W.2d at 627. In *State v. Gales*, 269 Neb. 443, 694 N.W.2d 124 (2005) (*Gales II*), we again rejected an argument that a jury is required to determine mitigating circumstances and to have input into the appropriate sentence in capital cases. We determined that the defendant in *Gales II* presented no basis to reconsider our decision in *Gales I*, and we noted that later holdings in the U.S. Supreme Court, see *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005), only reinforced our prior decision.

Similarly, in the present case, Hessler has cited no authority that would require us to reconsider our decisions in *Gales I* and *Gales II*. While *Ring* requires that a jury find aggravating

circumstances, neither *Ring* nor other authority requires that a jury find mitigating circumstances, weigh aggravating and mitigating circumstances, or have further input into determining the sentence. We are not persuaded by Hessler's arguments, and in the absence of authority, we reject his assertions that a jury must make such determinations.

(c) Exercise of Right to Jury in Aggravation Phase

As a final challenge to the constitutionality of the death penalty statutes, Hessler asserts that the statutory scheme improperly penalizes a defendant's exercise of the right to have a jury find aggravating circumstances. Hessler argues that if a defendant prefers to have the same fact finder determine both the aggravating circumstances and the sentence, the defendant must waive the right to have a jury find aggravating circumstances and instead must allow the sentencing panel to find aggravating circumstances because the statutory scheme does not allow a jury to determine the sentence. Hessler argues that being forced to make such a choice unconstitutionally burdens the defendant's assertion of the right to a jury determination of aggravating circumstances.

Hessler relies on *United States v. Jackson*, 390 U.S. 570, 88 S. Ct. 1209, 20 L. Ed. 2d 138 (1968), to support this argument. In *Jackson*, the U.S. Supreme Court found unconstitutional a federal statutory provision that authorized the imposition of a death sentence only when a jury recommended the death sentence. Under the statute, if the defendant waived jury trial or pled guilty, the maximum possible sentence the court could impose was a life sentence. The Court determined that the statutory provision was unconstitutional because it improperly coerced or encouraged the defendant to waive his or her Sixth Amendment right to a jury or his or her Fifth Amendment right to plead not guilty and because it needlessly penalized the defendant who asserted such rights.

We do not find Hessler's reliance on *Jackson* applicable or persuasive. Unlike *Jackson*, under the Nebraska death penalty statutes, a defendant cannot avoid the risk of a death penalty by waiving the right to a jury determination of aggravating circumstances; even if the defendant waived such right, the

sentencing panel could still impose a death penalty. Under the statutory provision in *Jackson*, the defendant could completely avoid the death penalty by waiving a jury trial or by pleading guilty. Under the Nebraska statutes, there is no such direct benefit achieved at the expense of waiving the right to a jury as there was in *Jackson*. By waiving the right to a jury under the Nebraska statutes, the sole benefit is that the defendant avoids the circumstance wherein the jury as fact finder finds aggravating circumstances and the judicial panel as fact finder determines the sentence. While the sentencing panel might be more thoroughly versed about the case if it had also found aggravating circumstances, this does not mean that the sentencing panel would necessarily make a sentencing decision that was more favorable to the defendant. Unlike *Jackson*, in which the benefit to waiving the right to a jury was the elimination of exposure to the death penalty, the Nebraska statutory scheme does not provide a clear advantage to a defendant who waives his or her right to have a jury determine aggravating circumstances. The Nebraska statutory scheme does not improperly coerce or encourage a defendant to waive his or her right to a jury and does not penalize a defendant who asserts such right. We reject Hessler's argument that the statutory scheme is unconstitutional pursuant to *Jackson*.

(d) Conclusion

Having concluded that each of Hessler's challenges to the constitutionality of Nebraska death penalty statutes is without merit, as a matter of law, we reject Hessler's fifth assignment of error.

6. No Error in Refusal of Instruction Requiring Jury to Make Unanimous, Written Findings of Fact in Aggravation Phase

In his sixth assignment of error, Hessler asserts that the court erred when it refused his requested instruction in the aggravation phase of the trial that would have required the jury to unanimously find facts supporting each alleged aggravating circumstance and to set forth such findings in writing. To establish reversible error from a court's refusal to give a requested

instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction. *State v. Blair*, 272 Neb. 951, 726 N.W.2d 185 (2007). We conclude that the court did not err in refusing the instruction, because the instruction did not accurately state the law and Hessler has not shown that he was prejudiced by the refusal to give the instruction.

Hessler requested an instruction to the jury in the aggravation phase which read:

> You, the jury, shall make written findings of fact based upon the trial of guilt and the aggravation hearing, identifying which, if any, of the alleged aggravating circumstances have been proven to exist beyond a reasonable doubt. Each finding of fact with respect to each alleged aggravating circumstance shall be unanimous. If you are unable to reach a unanimous finding of fact with respect to an aggravating circumstance, you must find that the State did not prove the alleged aggravating circumstance.

Hessler argues that the instruction was necessary to avoid the burden on the right to a jury trial found to be unconstitutional in *United States v. Jackson*, 390 U.S. 570, 88 S. Ct. 1209, 20 L. Ed. 2d 138 (1968). Hessler asserts that if the instruction were given, it could ameliorate the negative effects wherein the jury finds aggravating circumstances and the sentencing panel determines the sentences. He argues that when the jury finds aggravating circumstances, the sentencing panel is not adequately familiar with the facts underlying the aggravating circumstances to properly weigh such circumstances. Hessler also notes that if the sentencing panel made findings on aggravating circumstances, the panel would be statutorily required to be unanimous regarding the facts supporting an aggravating circumstance and to set forth such facts in a written order. Hessler argues that the jury should also be required to be unanimous regarding the specific facts that support an aggravating circumstance and that the jury should be required to set forth such facts in writing in order to better inform the sentencing panel's decision.

We note that in the aggravation phase in this case, the court instructed the jury that in order to find that an aggravating circumstance existed, it needed to "unanimously agree beyond a reasonable doubt that an aggravating circumstance is true" and "unanimously decide that the state proved each essential element of an aggravating circumstance beyond a reasonable doubt." Because the court properly instructed the jury that it needed to be unanimous in finding that the State proved the existence of an aggravating circumstance and each element of such circumstance and that the Nebraska death penalty statutes require no more, Hessler has failed to demonstrate any error of law in the instruction given or prejudice from the failure to give the instruction he requested.

Nebraska statutes require that when the right to a jury determination of aggravating circumstances has been waived and the sentencing panel finds aggravating circumstances, the "panel shall make written findings of fact . . . identifying which, if any, of the alleged aggravating circumstances have been proven" and that "[e]ach finding of fact with respect to each alleged aggravating circumstance shall be unanimous." § 29-2521(2). However, when the jury determines aggravating circumstances, the statutes provide only that the jury "shall deliberate and return a verdict as to the existence or nonexistence of each alleged aggravating circumstance," that "[e]ach aggravating circumstance shall be proved beyond a reasonable doubt," and that "[e]ach verdict with respect to each alleged aggravating circumstance shall be unanimous." § 29-2520(4)(f). The statutes do not require a jury to make written findings of fact or to be unanimous regarding the specific facts that support its verdict. The statutes require only that the jury return a verdict as to each alleged aggravating circumstance and that each such verdict be unanimous. The instructions given by the court in this case accurately stated the law, and the instruction requested by Hessler did not accurately state the law.

Hessler's reliance on *United States v. Jackson*, 390 U.S. 570, 88 S. Ct. 1209, 20 L. Ed. 2d 138 (1968), in connection with this assignment of error is not persuasive. As noted in connection with the previous assignment of error, Hessler asserts that there are inherent disadvantages in the situation where the jury finds

aggravating circumstances and the sentencing panel determines the sentence and that such disadvantages coerce or encourage a defendant to waive his or her right to a jury determination of aggravating circumstances and needlessly penalize defendants who assert such right. Hessler asserts that if the jury were required to make unanimous written findings of fact, it would lessen these perceived disadvantages. As we concluded in connection with the previous assignment of error, the Nebraska statutes are not unconstitutional under *Jackson*. The statutes do not require unanimous written findings of fact, and no such requirement need be imposed in order to save the statutes from being unconstitutional.

Neither *Jackson* nor other authority requires that the jury make unanimous written findings of fact. Because the tendered instruction was not a correct statement of law and because Hessler has shown no prejudice, the court's refusal to give Hessler's requested instruction was not reversible error. We reject Hessler's sixth assignment of error.

7. District Court Did Not Err in Granting Hessler's Waiver of Right to Counsel and Allowing Him to Appear Pro Se at Sentencing

Hessler, through appellate counsel, asserts that the district court erred when it granted his pro se motion to waive counsel and allowed him to appear pro se at the sentencing proceeding. He specifically claims that the court erred when it failed to conduct a hearing to determine his competency to waive counsel and when it found that he knowingly, voluntarily, and intelligently waived his right to counsel. On the record before us, we conclude that the court did not err in granting Hessler's motion to waive counsel.

(a) Standards for Determining Whether Defendant May Waive Counsel

Hessler cites *Godinez v. Moran*, 509 U.S. 389, 113 S. Ct. 2680, 125 L. Ed. 2d 321 (1993), and asserts that the inquiry into whether a defendant should be allowed to waive counsel is a two-step process in which the court considers, first, whether the defendant is competent to waive counsel and, second, whether

the defendant has knowingly and voluntarily waived counsel. Hessler argues that the court failed to follow *Godinez* because the court did not sua sponte conduct a competency hearing and did not make an explicit finding that he was competent to waive counsel. He also claims that the Court erred when it determined that his waiver of counsel was made knowingly, voluntarily, and intelligently.

[12] In *Godinez*, the U.S. Supreme Court referred to what it described as a "two-part inquiry," 509 U.S. at 401, into whether a court should accept a defendant's waiver of counsel. The Court indicated that where a defendant seeks to waive counsel, the trial court must be assured that the defendant is competent to do so and that "[i]n addition to determining that a defendant who seeks to plead guilty or waive counsel is competent, a trial court must satisfy itself that the waiver of his constitutional rights is knowing and voluntary." 509 U.S. at 400. The two-part inquiry set forth in *Godinez* is therefore, first, a determination that the defendant is competent to waive counsel and, second, a determination that the waiver is knowing and voluntary.

[13] The Court in *Godinez* also stated that the standard for determining whether a defendant is competent to waive counsel is the same as the standard for determining whether a defendant is competent to stand trial. In this regard, the Court stated that the standard for competence is "whether the defendant has 'sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding' and has 'a rational as well as factual understanding of the proceedings against him.'" 509 U.S. at 396. See *People v. Halvorsen*, 42 Cal. 4th 379, 165 P.3d 512, 64 Cal. Rptr. 3d 721 (2007) (recognizing *Godinez*' holding that standard for competency to waive trial is same as standard for competency to stand trial where defendant argued that court should have had doubt regarding his competency to stand trial after court concluded he was incapable of representing himself). Finally, in a footnote in *Godinez*, the Court noted:

> We do not mean to suggest, of course, that a court is required to make a competency determination in every case in which a defendant seeks to plead guilty or to waive

> his right to counsel. As in any criminal case, a competency determination is necessary only when a court has reason to doubt the defendant's competence.

509 U.S. at 401 n.13.

In response to Hessler's arguments, the State asserts that the court's inquiry in this case met the requirements set forth in *State v. Dunster*, 262 Neb. 329, 631 N.W.2d 879 (2001), and that the record supported a finding that Hessler's waiver of counsel was made knowingly, voluntarily, and intelligently. In *Dunster*, we stated, "A defendant may waive the constitutional right to counsel, so long as the waiver is made knowingly, voluntarily, and intelligently." 262 Neb. at 349, 681 N.W.2d at 898. However, we also noted in *Dunster* that before granting the defendant's request to discharge counsel, defense counsel had questioned the defendant's competence to waive counsel and the trial court received evidence relative to the defendant's competence and determined that the defendant was competent. In concluding that the trial court in *Dunster* did not err in granting the request to discharge counsel, we determined that "[t]he record shows that [the defendant] was competent and his request to discharge counsel was made knowingly, intelligently, and voluntarily." 262 Neb. at 355, 681 N.W.2d at 902. Thus, as is apparent in *Dunster*, our jurisprudence is consistent with the two-part inquiry in *Godinez v. Moran*, 509 U.S. 389, 113 S. Ct. 2680, 125 L. Ed. 2d 321 (1993), which requires both that the trial court be assured that the defendant is competent to waive counsel and that the waiver is made knowingly, voluntarily, and intelligently.

(b) On the Record Before Us, the District Court Did Not Have Reason to Doubt Hessler's Competence and No Competency Hearing Was Required

Although the analysis of whether a defendant may waive counsel is a two-part inquiry involving competence and waiver, a formal competency determination is not necessary in every case in which a defendant seeks to waive counsel. As noted above, pursuant to footnote 13 in *Godinez*, an explicit competency determination is necessary only when the court has reason to doubt the defendant's competence. Unlike *Dunster,*

supra, trial counsel in this case did not move for a competency hearing as a predicate to the court's consideration of Hessler's motion to waive counsel. Limiting our consideration only to the record on appeal, as we must, we determine that the proceedings did not provide reason to doubt Hessler's competence to waive counsel and that the court did not err when a competency hearing was not conducted, nor did it err when it did not make an explicit determination that Hessler was competent to waive counsel.

As noted above, the standard for determining competence is "whether the defendant has 'sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding' and has 'a rational as well as factual understanding of the proceedings against him.'" *Godinez*, 509 U.S. at 396. When Hessler filed his motion to waive counsel, he was still represented by counsel, and counsel did not move for a determination of Hessler's competence at that time, compare *Dunster, supra*, and there is no indication in the record on appeal that counsel had earlier challenged Hessler's competence to stand trial. There was no indication throughout pretrial proceedings and the trial itself that Hessler was unable to consult with counsel with a reasonable degree of rational understanding. To the contrary, the record contains references to consultations between Hessler and his counsel, both prior to and during the trial.

With respect to whether Hessler had a rational and factual understanding of the proceedings, we note that the court had observed Hessler over many months prior to trial and at trial, and that although Hessler indicated he was not on medications on the day the court considered his request to waive counsel, the court was in a position to be satisfied that any medication Hessler was or was not on did not compromise his present competence to waive counsel. See *LaHood v. State*, 171 S.W.3d 613 (Tex. App. 2005) (stating, generally, that although defendant was on medication, competency inquiry not mandated where there was no indication of present inability to communicate or understand proceeding). See, also, *U.S. v. Dalman*, 994 F.2d 537 (8th Cir. 1993). We also note that although Hessler's pro se filings, including his motion to waive counsel, contain irrelevant matter, they nevertheless indicate that Hessler understood the

factual nature of the proceedings against him and the potential consequences of such proceedings. Such filings indicate that he had a rational and factual understanding that he was being prosecuted for the death of Heather and that the death penalty was a potential punishment for that crime. See *People v. Halvorsen*, 42 Cal. 4th 379, 403, 165 P.3d 512, 529, 64 Cal. Rptr. 3d 721, 741 (2007) (concluding that although defendant's "'rambling, marginally relevant speeches'" might evidence some form of mental illness, record did not show that defendant lacked understanding of nature of proceedings and that more than "'bizarre actions'" or "'bizarre statements'" were required to raise doubt about competence). On the record before us and under the standard set forth in *Godinez v. Moran*, 509 U.S. 389, 113 S. Ct. 2680, 125 L. Ed. 2d 321 (1993), we believe that the trial court could reasonably determine that Hessler appeared to have an understanding of the proceedings and that therefore, the court did not have reason to doubt Hessler's competence to waive counsel. Thus, on this record, the court did not err when it did not declare a doubt regarding Hessler's competence and did not conduct a competency hearing, nor did it err when it did not make an explicit competency determination in connection with Hessler's motion to waive counsel.

(c) District Court Did Not Err in Finding Hessler's Waiver of Counsel Was Knowing, Voluntary, and Intelligent

Hessler claims that even if he was competent, his waiver of counsel was not knowing, voluntary, and intelligent. We determine that the court was not clearly erroneous in finding that his waiver of counsel was knowing, voluntary, and intelligent. When a criminal defendant has waived the right to counsel, this court reviews the record to determine whether under the totality of the circumstances, the defendant was sufficiently aware of his or her right to counsel and the possible consequences of his or her decision to forgo the aid of counsel. *State v. Gunther*, 271 Neb. 874, 716 N.W.2d 691 (2006).

We note that Hessler was represented by counsel throughout pretrial proceedings and during the guilt and aggravation phases of his trial. In other cases, we have found that the fact that a defendant has had the advice of counsel throughout the

prosecution is an indication that the defendant's waiver of counsel and election to proceed pro se was knowing and voluntary. *Gunther, supra*; *State v. Wilson*, 252 Neb. 637, 564 N.W.2d 241 (1997). The fact that Hessler was represented at earlier stages indicates that he was aware of his right to counsel and that he knew what he would forgo if he waived counsel.

We also note that the court questioned Hessler extensively regarding his knowledge of his right to counsel and the consequences of waiving counsel. Hessler's answers indicated that he was aware of his right to counsel and that he knew the consequences of waiving such right. The court also questioned Hessler regarding whether his waiver was voluntary, and Hessler's answers indicated that he was not being forced or coerced into waiving counsel. Based on our review of the record, we conclude that under the totality of the circumstances, Hessler was aware of his right to counsel and the consequences of waiving such right and that the court was not clearly erroneous in its determination that Hessler's waiver of counsel was knowing, voluntary, and intelligent.

(d) Conclusion

On the record before us, we cannot say that the court erred when it did not sua sponte conduct a competency hearing, and there was no error when the court did not make an explicit determination that Hessler was competent to waive counsel. Further, the court was not clearly erroneous in its determination that Hessler's waiver was knowing, voluntary, and intelligent. We therefore conclude that on this record, the district court did not err in granting Hessler's motion to waive counsel and appear pro se at sentencing. Accordingly, we reject Hessler's seventh assignment of error.

8. No Error in Receipt of Records of Guilt and Aggravation Phases of Trial at Sentencing Proceeding

In his final assignment of error, Hessler asserts that the district court erred in the sentencing phase by receiving into evidence the records of the guilt and aggravation phases of the trial and in using such evidence to determine his sentences. Hessler

argues that the sentencing panel's receipt of such evidence was erroneous because it was not authorized by statute. We conclude that the court was authorized to consider such evidence and did not err in admitting it.

[14-16] We have stated that the sentencing phase is separate and apart from the trial phase and that the traditional rules of evidence may be relaxed following conviction so that the sentencing authority can receive all information pertinent to the imposition of sentence. *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000). We have also stated that a sentencing court has broad discretion as to the source and type of evidence and information which may be used in determining the kind and extent of the punishment to be imposed, and evidence may be presented as to any matter that the court deems relevant to the sentence. *Id.* We have also stated that "the sentencing court, in imposing the death penalty, has . . . the statutory *authority* to consider the trial record." *State v. Ryan*, 248 Neb. 405, 442, 534 N.W.2d 766, 790 (1995). We cited § 29-2521 (Reissue 1995) as the statutory basis for these statements in *Ryan* and *Bjorklund*. The version of § 29-2521 in effect at the time of *Ryan* and *Bjorklund* provided that in the sentencing proceeding, "evidence may be presented as to any matter that the court deems relevant to sentence," including matters relating to aggravating and mitigating circumstances, and that "[a]ny such evidence which the court deems to have probative value may be received." As indicated below, we believe the principles referred to in *Ryan* and *Bjorklund* apply under the current version of Nebraska's death penalty statutes.

In the current version, § 29-2521(2) (Cum. Supp. 2006) addresses sentencing determination proceedings wherein the defendant has waived the right to a jury determination of aggravating circumstances and the sentencing panel decides aggravating circumstances. Section 29-2521(2) contains provisions similar to those quoted above from the prior version. Section 29-2521(3) of the current version addresses sentencing determination proceedings wherein, as in the present case, a jury has found aggravating circumstances and a sentencing

panel determines the sentence. Section 29-2521(3) provides that evidence may be presented as to "any matter that the presiding judge deems relevant to . . . mitigation . . . and . . . sentence excessiveness or disproportionality." The statute further provides that "[a]ny such evidence which the presiding judge deems to have probative value may be received." We determine that the current version of § 29-2521(2) and (3) gives the sentencing panel statutory authority to consider the trial record.

Section 29-2521 gives broad discretion to the presiding judge of the sentencing panel to determine the type of evidence relevant to the sentencing determination. In addition, the death penalty statutes read as a whole make clear that the sentencing panel needs to consider evidence of the crime and of aggravating circumstances in order to properly perform its balancing and proportionality sentencing functions. Under Neb. Rev. Stat. § 29-2522 (Cum. Supp. 2006), the sentencing panel is required to determine whether aggravating circumstances justify imposition of a death sentence, whether mitigating circumstances exceed or approach the weight of aggravating circumstances, and whether a death sentence is excessive or disproportionate to the penalty imposed in similar cases "considering both the crime and the defendant." The records of the guilt and aggravation phases of the trial clearly have probative value regarding these issues. The sentencing panel needs to understand the circumstances of the crime to "consider . . . both the crime and the defendant." *Id*. The record of the guilt phase provides information regarding the circumstances of the crime which aids the sentencing panel in determining whether a death sentence would be excessive or disproportionate, and the record of the aggravation phase assists the sentencing panel in the conduct of its balancing duty. Receipt of the records of the guilt and aggravation phases is authorized under the discretion given the presiding judge under § 29-2521.

We conclude that the court in this case did not err by receiving evidence of the guilt and aggravation phases of the trial in the sentencing hearing. We reject Hessler's final assignment of error.

9. Hessler's Sentence Is Proportional to Those in Similar Cases

[17] Finally, we are required to determine whether the death sentence imposed on Hessler is proportional to sentences imposed in similar cases. Pursuant to Neb. Rev. Stat. § 29-2521.03 (Reissue 1995), this court is required, upon appeal, to determine the propriety of a death sentence by conducting a proportionality review. Proportionality review under § 29-2521.03 looks only to other cases in which the death penalty has been imposed, *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000), and requires us to compare the aggravating and mitigating circumstances of this case with those present in other cases in which the death penalty was imposed, and ensure that the sentence imposed in this case is no greater than those imposed in other cases with the same or similar circumstances, *State v. Gales*, 269 Neb. 443, 694 N.W.2d 124 (2005). See, *State v. Dunster*, 262 Neb. 329, 631 N.W.2d 879 (2001); *Bjorklund, supra*; *State v. Lotter*, 255 Neb. 456, 586 N.W.2d 591 (1998).

In the present case, the State alleged, and the jury and sentencing panel found, the existence of three statutory aggravating circumstances: (1) Hessler had a substantial prior history of serious assaultive or terrorizing criminal activity (§ 29-2523(1)(a)); (2) the murder was committed in an effort to conceal the commission of the crimes of the kidnapping and sexual assault of Heather and the sexual assault of another girl, J.B. (§ 29-2523(1)(b)); and (3) the murder was especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence (§ 29-2523(1)(d)). At sentencing, Hessler offered no evidence other than his "Interlocutory Statement of the Defendant" that would bear on mitigating circumstances, and the sentencing panel concluded that no statutory and no nonstatutory mitigating circumstances were established. The panel also concluded that a death sentence would not be excessive or disproportionate to penalties imposed in similar cases, considering both the crime and the defendant.

We have reviewed our relevant decisions on direct appeal from other cases in which aggravating circumstances were found and the death penalty was imposed by the district court. See, e.g., *Gales, supra* (and cases gathered therein). In considering

proportionality in its sentencing order, the sentencing panel in this case took particular note of the circumstances presented in *Gales, supra*; *State v. Joubert*, 224 Neb. 411, 399 N.W.2d 237 (1986); *Bjorklund, supra*; and *State v. Otey*, 205 Neb. 90, 287 N.W.2d 36 (1979). We also find these cases to be of particular note in considering the proportionality of the sentence in this case. In *Gales*, the defendant was convicted of the first degree murder of a 13-year-old girl he had sexually assaulted, the first degree murder of the girl's 7-year-old brother, and the attempted second degree murder of the children's mother. The defendant in *Gales* was sentenced to death based upon, inter alia, aggravating circumstances under § 29-2523(1)(a), (b), and (d). In *Joubert*, the defendant was convicted of the first degree murders of a 13-year-old boy and a 12-year-old boy, both of whom disappeared during early morning hours, one while delivering newspapers. The defendant in *Joubert* was sentenced to death based upon aggravating circumstances under § 29-2523(1)(a), (b), and (d). In *Bjorklund*, the defendant was convicted of the first degree murder of an 18-year-old girl he had sexually assaulted, and the defendant was sentenced to death based upon aggravating circumstances under § 29-2523(1)(a), (b), and (d). In *Otey*, the defendant was convicted of the first degree murder of a woman he had sexually assaulted, and the defendant was sentenced to death based upon aggravating circumstances under § 29-2523(1)(b) and (d). We further note *State v. Williams*, 205 Neb. 56, 287 N.W.2d 18 (1979), in which the defendant was convicted of the first degree murders of two women and the sexual assault of another woman and was sentenced to death based upon aggravating circumstances similar to those in the present case. Having reviewed the relevant cases, we find that the imposition of the death sentence in this case is proportional to that in the same or similar circumstances.

VI. CONCLUSION

Having rejected each of Hessler's assignments of error and having found that the death sentence imposed in this case is proportional, we affirm Hessler's convictions and sentences.

AFFIRMED.

HEAVICAN, C.J., not participating.

NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES, APPELLEE, V. PAULA WEEKLEY, APPELLANT.

741 N.W.2d 658

Filed November 30, 2007. No. S-06-292.

1. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below.
2. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to settle jurisdictional issues presented by a case.
3. **Administrative Law: Jurisdiction: Appeal and Error.** Where a district court has statutory authority to review an action of an administrative agency, the district court may acquire jurisdiction only if the review is sought in the mode and manner and within the time provided by statute.
4. **Administrative Law: Jurisdiction.** "The county where the action is taken" within the meaning of Neb. Rev. Stat. § 84-917(2)(a) (Reissue 1999) is the site of the first adjudicated hearing of a disputed claim.

Appeal from the District Court for Dodge County: JOHN E. SAMSON, Judge. Vacated and remanded with directions to dismiss.

Lynnette Z. Boyle, of Tietjen, Simon & Boyle, for appellant.

Jon Bruning, Attorney General, and Frederick J. Coffman for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

GERRARD, J.

Paula Weekley, a former employee of the Nebraska Department of Health and Human Services (DHHS), appeals from the order of the district court for Dodge County affirming DHHS' decision to terminate her employment. On appeal, Weekley argues that pursuant to Neb. Rev. Stat. § 84-917(2)(a) (Reissue 1999), the district court for Dodge County did not have jurisdiction over this appeal. We conclude that DHHS' petition was not filed in compliance with § 84-917(2)(a), and as a result, the district court for Dodge County did not have jurisdiction.

FACTS

Weekley was a protection and safety worker for DHHS and was assigned to perform case work for Adult Protective Services (APS). APS workers assist elderly and vulnerable adults in potentially neglectful or abusive settings and serve as resources for citizens who need assistance in caring for elderly and vulnerable adults.

On Friday, September 6, 2002, APS received a telephone call from a nurse at the Fremont Area Medical Center who was concerned about the care an elderly woman was receiving at the woman's home. On September 9, the case was assigned to Weekley. Weekley was on annual leave at the time, but returned to her office on Tuesday, September 10.

Upon returning to work on September 10, 2002, Weekley reviewed her telephone messages, intake forms, and other documents that had accumulated on her desk during her absence. Among the documents she reviewed was the intake report pertaining to the elderly woman. Under DHHS regulations, Weekley was to make face-to-face contact with the subject of the report within 5 days. But Weekley was unable to locate her and never made face-to-face contact. On September 23, a fire broke out at the elderly woman's home, resulting in her death.

On October 21, 2002, Weekley received a "Written Notice of Allegations," relating to the handling of the case and informing Weekley that if the allegations were substantiated, she would be subject to disciplinary action. On January 2, 2003, the protection and safety administrator issued a "Written Notice of Discipline" terminating Weekley's employment. The protection and safety administrator testified that the decision was based on the current information related to the handling of the elderly woman's case and Weekley's previous conduct that had resulted in disciplinary actions. Weekley filed a grievance with DHHS. The agency director reviewed Weekley's case and affirmed the protection and safety administrator's decision to terminate Weekley's employment.

Weekley appealed the agency director's decision through the administrator of the Department of Administrative Services (DAS). Pursuant to the grievance procedures in Weekley's labor contract, a "mini hearing" was held before the designee

of the employee relations administrator of the DAS in Lincoln, Lancaster County, Nebraska. The relevant provisions of the labor contract relating to the "mini hearing" process are as follows:

> 4.10.2 **MINI HEARING PROCESS**. When an appeal has been submitted to the Administrator of the DAS Employee Relations Division, and before a hearing officer/arbitrator is appointed, the Administrator of the DAS Employee Relations Division or his/her designee may confer with the Union representative, or grievant, if the grievant chooses not to be represented by [the Nebraska Association of Public Employees/American Federation of State, County and Municipal Employees] or any other representative, and the Agency representative to discuss and attempt to informally resolve the grievance. In cases where the grievant is not represented by the union, a union representative may attend the hearing and observe. . . . This conference (mini-hearing) shall be informal and the rules of evidence shall not apply. All exhibits that the Agency or Grievant want the Administrator of the DAS Employee Relations Division/Designee to consider must be received by the DAS Employee Relations Division and the opposing party a minimum of three days before the mini-hearing. . . . Neither party may be represented by anyone licensed (active or inactive) to practice law in the State of Nebraska at this conference.
>
> 4.10.3 The Administrator of the DAS Employee Relations Division or his/her designee may request a conference with the parties to discuss resolution of the grievance and shall have the authority to interview witnesses or require documents and other items to be produced prior to the conference. . . . However, the intent of the parties is that the matter be considered at this step in an informal manner and be resolved as expeditiously as possible.
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> 4.10.4 After the conference and a review of the grievance and other documents submitted by the parties, the Administrator of the DAS Employee Relations Division or his/her designee shall issue a written decision to the parties to reverse, modify or uphold the answer made by the Agency Head at Step 2. This decision shall be issued

> within 20 workdays of the conference and shall include a description of the events giving rise to the grievance and the rationale upon which the decision is made. If a written decision is not rendered within 20 workdays, either party may request the grievance be heard before the hearing officer/arbitrator, as appropriate. This decision shall not constitute a part of the appeal record if the matter is heard by an arbitrator or a hearing officer.
>
> 4.10.5 If either party is not satisfied with the decision made by the Administrator of the DAS Employee Relations Division or his/her designee, that party shall give notice that the appeal be heard by a hearing officer/arbitrator . . . by filing a notice with the Administrator of the DAS Employee Relations Division in the office of the Employee Relations Division within 7 workdays of receipt of the decision from the Administrator of the DAS Employee Relations Division or his/her designee.
>
> 4.10.6 If notice is not received within the prescribed time frames, the decision of the Administrator of the DAS Employee Relations Division or his/her designee shall be considered final.

In accordance with these provisions, the appointed designee of the DAS employee relations administrator conducted the "mini hearing" in Lancaster County. At the "mini hearing," each party called one witness, submitted exhibits, and presented oral arguments. Following the "mini hearing," the appointed designee issued a written decision setting forth findings of fact, conclusions of law, and affirming DHHS' decision to terminate Weekley's employment.

Weekley appealed this decision to the State Personnel Board. A hearing officer was appointed, and a hearing was conducted in Dodge County, Nebraska. At the hearing, both parties were given the opportunity to present new or different testimony and exhibits, examine and cross-examine witnesses, and offer argument in support of their position. Following the hearing, the hearing officer made findings of fact, conclusions of law, and a recommendation. For his recommendation, the hearing officer explained that "[i]f the Board concludes that the fact that [the elderly woman] died overrides all other considerations, the

Board should dismiss [Weekley] and uphold the discipline." The hearing officer further recommended, however, that "[i]f the Board concludes that [Weekley] can be a competent performer for [DHHS] if demoted to a position requiring less independent judgement and with more day-to-day supervision, the Board should reject [DHHS'] discipline and sustain the Grievance."

The State Personnel Board adopted the hearing officer's findings of fact and conclusions of law, but concluded that the hearing officer's recommendation was insufficient. The State Personnel Board concluded that Weekley "was guilty of the conduct alleged, but the discipline imposed was not warranted based on the evidence presented." The board then remanded the matter to DHHS for further action.

DHHS appealed the State Personnel Board's decision by filing a petition for review in the Dodge County District Court. In her answer, Weekley asserted that the Dodge County District Court did not have jurisdiction because DHHS' petition for further review was not filed "in the district court of the county where the action is taken," as required by § 84-917. The district court rejected Weekley's argument and concluded that DHHS' petition for further review was properly filed in the Dodge County District Court.

The district court further concluded that DHHS had "met its burden of proof that its decision to terminate [Weekley's employment] was made in good faith and for just cause, given the nature and severity of the infraction and in consideration with the history of discipline and performance contained in the employee's personnel file." Accordingly, the court reinstated DHHS' decision to terminate Weekley's employment. Weekley appealed.

ASSIGNMENTS OF ERROR

Weekley assigns that the district court erred in finding (1) that it had jurisdiction to hear this case because the court erroneously concluded that the "mini hearing" was not the first adjudicated hearing, (2) that DHHS had just cause for disciplining Weekley, and (3) that DHHS' decision to terminate Weekley's employment was made in good faith and for cause.

STANDARD OF REVIEW

[1] Statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below.[1]

ANALYSIS

[2,3] Before reaching the legal issues presented for review, it is the duty of an appellate court to settle jurisdictional issues presented by a case.[2] Where a district court has statutory authority to review an action of an administrative agency, the district court may acquire jurisdiction only if the review is sought in the mode and manner and within the time provided by statute.[3]

[4] The jurisdictional requirements for obtaining judicial review of a final administrative decision under the Administrative Procedure Act are set forth in § 84-917(2)(a). This section provides, in relevant part, that "[p]roceedings for review shall be instituted by filing a petition in the district court of the county where the action is taken within thirty days after the service of the final decision by the agency."[4] We have repeatedly interpreted the phrase "'county where the action is taken'" to mean "'"the site of the first adjudicated hearing of a disputed claim."'"[5]

Weekley argues that the "mini hearing" held in Lancaster County was the first adjudicated hearing and that therefore, under § 84-917(2)(a), DHHS' petition for further review should have been filed in the district court for Lancaster County. Weekley contends that DHHS incorrectly filed its petition for further

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[1] *Zitterkopf v. Maldonado*, 273 Neb. 145, 727 N.W.2d 696 (2007).

[2] *Cerny v. Todco Barricade Co.*, 273 Neb. 800, 733 N.W.2d 877 (2007).

[3] *Essman v. Nebraska Law Enforcement Training Ctr.*, 252 Neb. 347, 562 N.W.2d 355 (1997).

[4] § 84-917(2)(a).

[5] *Reiter v. Wimes*, 263 Neb. 277, 281, 640 N.W.2d 19, 23 (2002). Accord, *Essman v. Nebraska Law Enforcement Training Ctr., supra* note 3; *Metro Renovation v. State Dept. of Labor*, 249 Neb. 337, 543 N.W.2d 715 (1996), *disapproved on other grounds, State v. Nelson, ante* p. 304, 739 N.W.2d 199 (2007).

review in Dodge County, and as a result, the district court for Dodge County did not have jurisdiction over this appeal.

DHHS argues that its petition for further review was properly filed in the district court for Dodge County because the "mini hearing" held in Lancaster County did not constitute an adjudicated hearing. In support of this argument, DHHS points to the procedures governing the grievance process—in particular, the informal nature in which "mini hearings" are conducted. DHHS notes that in a "mini hearing," the rules of evidence do not apply, neither party may be represented by anyone licensed to practice law, and the written decision issued at the conclusion of the "mini hearing" does not become a part of the appeal record.

Notwithstanding the procedural limitations and the informal nature of the "mini hearing," we are not persuaded by DHHS' argument that the "mini hearing" was not an adjudicated hearing. Neither § 84-917(2)(a) nor any of our previous decisions addressing this issue require that to qualify as the first adjudicated hearing, the hearing must apply the formal rules of evidence, allow representation of counsel, or create a transcript that is part of the record on appeal. Instead, given the record before us, we conclude that the "mini hearing" in Lancaster County was the first adjudicated hearing.

In so finding, we note that the procedures governing the "mini hearing" in this case are very similar to those used in small claims court. Proceedings in small claims court are conducted on a very informal basis with a minimum of procedural requirements.[6] Parties are not represented by counsel[7]; matters are tried without a jury[8]; the "hearing and disposition of all matters shall be informal"[9]; the formal rules of evidence do not apply[10]; and,

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[6] *Henriksen v. Gleason*, 263 Neb. 840, 643 N.W.2d 652 (2002); *Harris v. Eberhardt*, 215 Neb. 240, 338 N.W.2d 53 (1983).

[7] Neb. Rev. Stat. § 25-2803(2) (Reissue 1995).

[8] Neb. Rev. Stat. § 25-2805 (Cum. Supp. 2006).

[9] Neb. Rev. Stat. § 25-2806 (Reissue 1995).

[10] *Id.*

on appeal, all cases are tried by the district court de novo.[11] Yet, in spite of the informal nature of these proceedings, we would not say that a decision issued by a small claims court is anything less than an adjudication. The decision of the small claims court is a "judgment," and when the time for appeal has run, the prevailing party can obtain execution on that judgment as in any other case in county court.[12] Likewise, we cannot say that the "mini hearing" in the present case, which shares much of the same procedural informality, is anything other than an adjudication.

Here, the "mini hearing" was held in the presence of the appointed designee who sat as a decisionmaker. Prior to the "mini hearing," both DHHS and Weekley were given the opportunity to submit exhibits and briefs to the appointed designee. And at the "mini hearing," the parties were allowed to present witnesses, offer exhibits, and present oral arguments. Moreover, following the "mini hearing," the appointed designee issued a written decision that, if not appealed, would have become the final and binding decision. In other words, an agency-appointed decisionmaker issued a ruling based on evidentiary submissions, that in the absence of an appeal, would have been a legally binding determination of the dispute. A hearing was held, however informal, and the appointed designee adjudicated the dispute based on that hearing.

DHHS also claims that the decision rendered by the appointed designee following the "mini hearing" was not an "'adjudication,'" because it was not "'the determination *by the highest or ultimate authority* of an agency.'"[13] DHHS asserts that the highest authority in this case was the State Personnel Board hearing officer who was appointed, conducted a hearing in Dodge County, and issued a decision.

We rejected a similar argument in *Essman v. Nebraska Law Enforcement Training Ctr.*[14] In *Essman*, we were urged to create

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[11] Neb. Rev. Stat. § 25-2734 (Reissue 1995).

[12] § 25-2806.

[13] Brief for appellee at 21-22.

[14] *Essman v. Nebraska Law Enforcement Training Ctr.*, *supra* note 3.

an exception to the "first adjudicated hearing" rule by holding that "where the agency conducts a subsequent hearing and has the power to receive additional evidence before issuing its final order, the site of the last hearing should be 'the county where the action is taken' for purposes of § 84-917(2)(a)."[15] We declined to create such an exception. We explained that our construction of the statute "provides a party with a clear statement of where to file a petition seeking judicial review of an administrative action," and there is "no reason to complicate compliance with the rule by grafting unnecessary exceptions upon it."[16]

As in *Essman*, we conclude here that conducting a subsequent hearing, where new or additional evidence may be received, does not change the character of the *first* adjudicated hearing. And in the present case, for the reasons explained above, the *first* adjudicated hearing was in Lancaster County. Therefore, we agree with Weekley that the Dodge County District Court lacked jurisdiction to overrule the State Personnel Board and affirm DHHS' termination of Weekley's employment. Having so determined, we need not consider Weekley's remaining assignments of error.

We recognize that DHHS, unfortunately, faced a difficult choice in deciding where to prosecute its appeal. And parties should not be discouraged from pursuing alternative means of resolving their disputes. However, confusion could have been avoided in this case had the labor contract been drafted to more expressly elect between mediation and a binding hearing on the merits. Nonetheless, the negotiated contract set the rules and we are called upon to judge the proceedings accordingly.

CONCLUSION

We conclude that the "mini hearing" held in Lancaster County was the first adjudicated hearing. As such, pursuant to § 84-917(2)(a), DHHS was required to file its petition for further review in the district court for Lancaster County. But DHHS filed its petition for further review in Dodge County, rather than Lancaster County, and the Dodge County District Court did not

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[15] *Id.* at 351, 562 N.W.2d at 358.

[16] *Id.* at 351-52, 562 N.W.2d at 358.

have jurisdiction. The judgment of the district court is vacated, and the cause is remanded with directions to dismiss DHHS' petition for review.

VACATED AND REMANDED WITH DIRECTIONS TO DISMISS.

IN RE TRUST CREATED BY LAVOHN C. ISVIK, DECEASED. SECURITY NATIONAL BANK, TRUSTEE OF THE LAVOHN C. ISVIK REVOCABLE TRUST, APPELLEE, AND IOWA STATE UNIVERSITY FOUNDATION ET AL., INTERESTED PARTIES, APPELLEES, V. MARY ELLEN RICKERT AND LAVOHN C. STINE, APPELLANTS.

741 N.W.2d 638

Filed November 30, 2007. No. S-06-420.

1. **Decedents' Estates: Appeal and Error.** In the absence of an equity question, an appellate court, reviewing probate matters, examines for error appearing on the record made in the county court.
2. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Trusts: Equity: Appeal and Error.** Appeals involving the administration of a trust are equity matters and are reviewable in an appellate court de novo on the record.
4. **Equity: Reformation.** A proceeding to reform a written instrument is an equity action.
5. **Appeal and Error.** In a review de novo on the record, an appellate court reappraises the evidence as presented by the record and reaches its own independent conclusions with respect to the matters at issue.
6. **Statutes.** Statutory interpretation presents a question of law.
7. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
8. **Rules of Evidence: Appeal and Error.** Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, the admissibility of evidence is reviewed for an abuse of discretion.
9. **Statutes: Presumptions: Words and Phrases.** Generally, when the word "may" is used in a statute, permissive or discretionary action is presumed.
10. **Trusts.** A document by which a settlor purports to revoke a revocable trust is a term of that trust within the meaning of Neb. Rev. Stat. § 30-3841 (Cum. Supp. 2006).
11. **Evidence: Proof: Words and Phrases.** Clear and convincing evidence is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved.

12. **Evidence: Proof.** Evidence may be clear and convincing despite the fact that other evidence may contradict it.

Appeal from the County Court for Douglas County: JEFFREY MARCUZZO, Judge. Reversed and remanded with directions.

William J. Lindsay, Jr., and Francie C. Riedmann, of Gross & Welch, P.C., L.L.O., for appellants.

Richard J. Gilloon and Bradley B. Mallberg, of Erickson & Sederstrom, P.C., for appellee Security National Bank.

David S. Houghton and J.P. Sam King, of Lieben, Whitted, Houghton, Slowiaczek & Cavanagh, P.C., L.L.O., for appellees Iowa State University Foundation et al.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

STEPHAN, J.

LaVohn C. Isvik, as settlor of the LaVohn C. Isvik Revocable Trust, wrote a letter to the trustee stating that she was revoking the trust and requesting that all holdings of the trust be conveyed to her. Approximately 2 weeks later, she died unexpectedly. In trust administration proceedings commenced by the trustee following her death, the county court for Douglas County concluded that Isvik did not intend to revoke the trust, but only to discharge the trustee. The issue presented in this appeal is whether the court erred in reforming the revocation letter to conform to what it perceived to be Isvik's true intent. In resolving this issue, we must decide whether the county court also erred in relying upon extrinsic evidence of intent.

I. BACKGROUND

Under the terms of the original trust created by Isvik in 1995, she was the sole trustee and her two daughters, Mary Ellen Rickert and LaVohn C. Stine, the appellants herein, were contingent death beneficiaries. Isvik reserved the right "[t]o amend or revoke this agreement, in whole or in part, by written instrument filed with my trustee . . . ."

In 2003, Isvik amended the trust instrument by naming George E. Nelson as cotrustee. After her husband died later that year, Isvik again amended the trust instrument to add beneficiaries and alter trust property distributions. Under the terms of the second amendment, the appellants were named the beneficiaries, upon Isvik's death, of certain real estate located in Douglas County, Nebraska. The amendment also added Iowa State University Foundation; Delta Tau Delta Scholarship Foundation, Inc.; Sigma Kappa Foundation, Inc.; Klemme United Methodist Church; and Trinity Lutheran Church (collectively the charities) as beneficiaries of the remainder of the trust assets.

Sometime thereafter, Isvik became dissatisfied with Nelson's performance as cotrustee. In December 2004, she sent a letter to Nelson, removing him as cotrustee and naming Security National Bank (the Bank) as successor trustee. The letter was drafted by Isvik's attorney William Lynch and signed by Isvik. In February 2005, Isvik executed a third amendment to the trust in which she appointed the Bank as sole trustee.

Isvik subsequently became dissatisfied with the Bank's performance in this capacity. In July 2005, she and Rickert met with Douglas Oldaker and James Kerkhove of the Bank's trust department. Although Oldaker was not present for the beginning of the meeting, Rickert testified that Isvik "shook . . . Kerkhove's hand . . . wished him a good day [and] said 'I'm revoking my trust.'" However, Oldaker and Kerkhove both testified that their impression from the meeting was that Isvik was only interested in removing the Bank as trustee. Oldaker asked Isvik to give the Bank 30 more days in which to address her concerns and improve its service. With Rickert's concurrence, Isvik agreed to Oldaker's proposal.

Still displeased with the Bank, Isvik composed a letter to Oldaker. Because of her impaired vision, Isvik dictated the letter to her personal assistant, Ruth Capps, who typed it. The letter, signed by Isvik and received by the Bank on August 26, 2005, stated in part: "I am revoking my Trust as of this date. Consider this my notice to you[.] Make no further transactions with any of my holdings and convey all materials pertaining to and including my holdings to me immediately." Rickert testified that she had a

telephone conversation with Isvik on August 25. She stated that Isvik had indicated that she had just sent a letter to the Bank revoking her trust and that she felt "'relieved.'"

Oldaker testified that when he received this letter on August 26, 2005, he called Isvik to inquire about her intent. Oldaker testified that, based on his legal training, he was concerned about her use of the term "revoking" and that he wanted to clarify that she actually intended to revoke the trust and thus alter the dispositive provisions of her estate. He reminded her that "by revoking the trust, it would throw the trust assets into probate." Oldaker testified that after this discussion with Isvik, he concluded that she wanted to act as her own trustee and did not want her trust assets to pass through probate. Oldaker stated that the Bank proceeded as if the trust had not been revoked.

Lynch testified that he also received a copy of the letter. On or about August 29, 2005, Lynch called Isvik "to find out why she sent the letter and what was going on." Lynch stated that his initial impression from Isvik was that she wanted to revoke the trust. However, after some discussion about the effects of revocation, Lynch concluded that Isvik only wanted to remove the Bank as trustee and did not want to revoke the trust. Lynch testified that he and Isvik agreed that he would prepare legal documents necessary to name new trustees of her trust.

Isvik was scheduled to meet with Lynch on September 7, 2005, to sign the new trust documents. On September 4, she died from injuries sustained in a fall 2 days earlier. As a result, Isvik never reviewed or signed the new trust documents.

After Isvik's death, the Bank filed a trust registration statement and a petition for trust administration with the county court for Douglas County pursuant to Neb. Rev. Stat. §§ 30-3812 to 30-3820 (Cum. Supp. 2006). The Bank sought "an order declaring whether the Trust was revoked by the August 26, 2005 letter or should be reformed to effect a change in trustee only." The appellants moved to dismiss the petition and strike the trust registration statement. Subsequently, the charities entered an appearance as interested parties.

The county court conducted a consolidated evidentiary hearing on the Bank's petition and the appellants' motion to dismiss. The unsigned documents prepared by Lynch were received in

evidence over the appellants' objection. Subsequently, the court entered an order in which it found by clear and convincing evidence that Isvik's use of the term "revoke" in her August 2005 letter "was a mistake and was only an attempt to change the trustee and not to terminate the trust itself." The court further determined that because the letter did not revoke the trust and no formal change of the trustee was made prior to Isvik's death, the Bank remained the trustee. The court directed the Bank to carry out the terms and administer the trust pursuant to Neb. Rev. Stat. § 30-3866 (Cum. Supp. 2006), and denied the appellants' motion to dismiss and motion to strike.

Following the entry of the county court's order, the appellants filed a motion requesting that no supersedeas bond or undertaking be required in order to pursue an appeal. The court entered an order on April 7, 2006, in which it required a supersedeas bond or undertaking in the amount of $50,000. On April 10, the appellants timely filed their notice of appeal and deposited the appropriate docketing fees and cost bond. On the same day, the appellants filed a "Bond Commitment" in the county court which professed their diligence in attempting to obtain a supersedeas bond. Attached to the bond commitment was a letter from a surety company stating that it would issue the bond upon receipt of an irrevocable letter of credit. On April 25, the appellants filed a $50,000 supersedeas bond with the clerk of the county court.

After this appeal was docketed in the Nebraska Court of Appeals, the Bank, joined by the charities, filed a motion to dismiss on grounds that the appellants failed to file a supersedeas bond or undertaking within 30 days of the county court's final order, as required by Neb. Rev. Stat. § 30-1601(3) (Cum. Supp. 2006). The Court of Appeals overruled the motion but ordered the parties to submit supplemental briefs on the issue, which they did. Subsequently, we moved the appeal to our docket on our own motion pursuant to our statutory authority to regulate the caseloads of the appellate courts of this state. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

II. ASSIGNMENTS OF ERROR

The appellants assign, restated, consolidated, and reordered, that the county court erred in (1) considering extrinsic evidence

of Isvik's intent in the trust revocation letter, (2) receiving exhibit 10, (3) finding that Isvik's trust revocation letter was a mistake, (4) reforming the terms of Isvik's trust revocation letter without clear and convincing evidence of a contrary intent, and (5) finding that the Bank was the trustee on the date of Isvik's death.

III. STANDARD OF REVIEW

[1,2] In the absence of an equity question, an appellate court, reviewing probate matters, examines for error appearing on the record made in the county court.[1] When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.[2]

[3-5] Appeals involving the administration of a trust are equity matters and are reviewable in an appellate court de novo on the record.[3] A proceeding to reform a written instrument is an equity action.[4] Accordingly, we review the reformation issues in this trust administration proceeding de novo on the record. In a review de novo on the record, an appellate court reappraises the evidence as presented by the record and reaches its own independent conclusions with respect to the matters at issue.[5]

[6,7] Statutory interpretation presents a question of law.[6] When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.[7]

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[1] *In re Trust of Rosenberg*, 273 Neb. 59, 727 N.W.2d 430 (2007).

[2] *Id.*

[3] *Id.*; *In re R.B. Plummer Memorial Loan Fund Trust*, 266 Neb. 1, 661 N.W.2d 307 (2003).

[4] *Haines v. Mensen*, 233 Neb. 543, 446 N.W.2d 716 (1989); *Newton v. Brown*, 222 Neb. 605, 386 N.W.2d 424 (1986); *Hohneke v. Ferguson*, 196 Neb. 505, 244 N.W.2d 70 (1976).

[5] *Shearer v. Shearer*, 270 Neb. 178, 700 N.W.2d 580 (2005).

[6] *Rohde v. City of Ogallala*, 273 Neb. 689, 731 N.W.2d 898 (2007).

[7] *Id.*

[8] Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, the admissibility of evidence is reviewed for an abuse of discretion.[8]

IV. ANALYSIS

1. Applicability of Nebraska Uniform Trust Code

The revocable trust which is the subject of this proceeding was created in 1995. The Nebraska Uniform Trust Code (NUTC), Neb. Rev. Stat. §§ 30-3801 to 30-38,110 (Cum. Supp. 2006), was enacted in 2003 and became operative on January 1, 2005. Except as otherwise provided in the NUTC, it applies "to all trusts created before, on, or after January 1, 2005" and "to all judicial proceedings concerning trusts commenced on or after January 1, 2005."[9] This trust administration proceeding was commenced on September 22, 2005. We have noted that the NUTC is generally applicable to all trusts in existence on January 1, 2005, subject to certain statutory and perhaps constitutional exceptions.[10] Here, the parties have directed us to no exception to the applicability of the NUTC to the preexisting trust, and we have found none. Accordingly, we conclude that the NUTC applies to this proceeding.

2. Supersedeas Bond

As noted, the appellees' motion for summary dismissal was overruled but the parties were ordered to file supplemental briefs on the issue of whether the appeal should be dismissed because a supersedeas bond was not filed within 30 days of the order from which the appeal was taken. We address this threshold issue.

[9] Appellate review under the NUTC is governed by § 30-1601(3), which provides in pertinent part:

> When the appeal is by someone other than a personal representative, conservator, trustee, guardian, or guardian

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[8] *Worth v. Kolbeck*, 273 Neb. 163, 728 N.W.2d 282 (2007).

[9] § 30-38,110(a)(1) and (2).

[10] *In re Trust Created By Inman*, 269 Neb. 376, 693 N.W.2d 514 (2005). See, also, John M. Gradwohl & William H. Lyons, *Constitutional and Other Issues in the Application of the Nebraska Uniform Trust Code to Preexisting Trusts*, 82 Neb. L. Rev. 312 (2003).

> ad litem, the appealing party shall, within thirty days after the entry of the judgment or final order complained of, deposit with the clerk of the county court a supersedeas bond or undertaking in such sum as the court shall direct . . . conditioned that the appellant will satisfy any judgment and costs that may be adjudged against him or her . . . unless the court directs that no bond or undertaking need be deposited. If an appellant fails to comply with this subsection, the Court of Appeals on motion and notice may take such action, including dismissal of the appeal, as is just.

We view the authority to dismiss an appeal conferred by this statute as discretionary in nature, in that it directs that a court "may" take such action as is just. Generally, when the word "may" is used in a statute, "permissive or discretionary action is presumed."[11] Here, the record reflects that the appellants had initiated but not completed efforts to obtain a supersedeas bond within the 30-day period. The bond was actually filed 46 days after the entry of judgment. There is no indication that the late filing resulted in prejudice or delay. We conclude that dismissal would not be just under these circumstances.

3. Reformation

Isvik's final letter to the Bank is unambiguous. In the letter, she clearly and unequivocally stated, "I am revoking my Trust as of this date[,]" and she directed the Bank to convey all trust holdings and materials to her. In reforming this document, the county court relied upon the following provision of the NUTC:

> The court may reform the terms of a trust, *even if unambiguous*, to conform the terms to the settlor's intention if it is proved by clear and convincing evidence that both the settlor's intent and the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement.[12]

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[11] Neb. Rev. Stat. § 49-802(1) (Reissue 2004).

[12] § 30-3841 (emphasis supplied).

In order to resolve the questions presented in this appeal, we must initially decide whether Isvik's letter is subject to reformation under this provision. If so, we must determine whether extrinsic evidence as to Isvik's intent can be considered and, finally, whether there is clear and convincing evidence that Isvik's true intent at the time she signed and mailed the letter was to discharge the Bank as trustee but keep the trust in existence.

(a) Was Letter "Term of a Trust" Subject to Reformation Under § 30-3841?

[10] The NUTC defines the phrase "terms of a trust" as "the manifestation of the settlor's intent regarding a trust's provisions as expressed in the trust instrument or as may be established by other evidence that would be admissible in a judicial proceeding."[13] Here, the trust instrument reflects the reserved power of the settlor, during her lifetime, "[t]o amend and revoke this agreement, in whole or in part, by written instrument filed with [the] trustee . . . ." This reserved power contemplates and indeed requires that the manifestation of a settlor's intent to revoke the trust must appear in a subsequently executed and delivered document which is distinct from the trust instrument itself. We conclude that a document by which a settlor purports to revoke a revocable trust is a term of that trust within the meaning of § 30-3841.

(b) May Court Consider Extrinsic Evidence Regarding Settlor's Intent in Determining Whether Terms of Trust Were Affected by Mistake of Fact or Law and Thus Subject to Reformation Under § 30-3841?

The appellants argue that because Isvik's intent to revoke the trust was unambiguously stated in her letter to the Bank, the county court erred in receiving extrinsic evidence of a contrary intent. They rely upon *In re Trust Created by Cease*,[14] in which

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[13] § 30-3803(19).

[14] *In re Trust Created by Cease*, 267 Neb. 753, 756, 677 N.W.2d 495, 498 (2004).

we held that parol evidence of intent should not have been admitted with respect to a document executed by the settlor of a revocable trust who was also its trustee, stating that he was resigning as trustee and that such resignation was "'intended to terminate said trust.'" We held that the document was unambiguous and operated to terminate the trust as a matter of law upon its execution.

In re Trust Created by Cease was decided before the NUTC became effective and did not involve the issue of reformation based upon mistake. Accordingly, it is not controlling on the precise issue presented here. Nor is this a case in which a party seeks to alter, vary, or contradict the terms of a written contract by proof of a prior or contemporaneous oral agreement, which would be prohibited by the parol evidence rule.[15] The parties have not directed us to any pre-NUTC Nebraska case law addressing the admissibility of extrinsic evidence of intent in an action to reform a trust instrument or related document, and this is our first occasion to consider the issue under the NUTC.

Section 30-3841 is taken verbatim from § 415 of the Uniform Trust Code. The comment to that section draws a distinction between reformation and resolution of an ambiguity:

> Resolving an ambiguity involves the interpretation of language already in the instrument. Reformation, on the other hand, may involve the addition of language not originally in the instrument, or the deletion of language originally included by mistake, if necessary to conform the instrument to the settlor's intent. Because reformation may involve the addition of language to the instrument, or the deletion of language that may appear clear on its face, *reliance on extrinsic evidence is essential.* To guard against the possibility of unreliable or contrived evidence in such circumstance, the higher standard of clear and convincing proof is required.[16]

The NUTC specifically provides that it is supplemented by the "common law of trusts and principles of equity" except to

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[15] See *Par 3, Inc. v. Livingston*, 268 Neb. 636, 686 N.W.2d 369 (2004).

[16] Unif. Trust Code § 415, 7C U.L.A. 514, comment at 515 (2006) (emphasis supplied).

the extent modified by the code or another statute.[17] In equitable actions to reform other types of written instruments, we have held that extrinsic evidence is admissible to prove mistake and actual intent. For example, in an action involving reformation of an insurance policy, we noted that the "power of a court to correct a mutual mistake implies the admissibility of competent and necessary proof of such mistake."[18] We have held that the parol evidence rule does not apply in an action seeking reformation of a contract on grounds of mistake and fraud, because such evidence is necessary to a determination of the antecedent agreement between the parties.[19] In such cases, "the evidence . . . is mainly or wholly oral" because "[i]n order to prove the mistake it is indispensable to show by parol in what particulars the writing differs from the oral agreement."[20] Thus, we have held extrinsic evidence to be admissible in actions seeking reformation of deeds,[21] promissory notes,[22] and insurance policies.[23]

Here, Isvik unambiguously informed the Bank that she was revoking her trust. The county court was not asked to interpret her words, but, rather, to determine whether she wrote them in a mistaken attempt to achieve the different objective of leaving the trust in place but discharging the Bank as trustee. Based upon the comment to § 415 of the Uniform Trust Code and our consistent prior holdings that extrinsic evidence of intent is admissible in equitable actions for reformation of written instruments, we conclude that the county court did not err in receiving extrinsic evidence on the issue of Isvik's intent. We consider that evidence in our de novo review.

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[17] § 30-3806.

[18] *Central Granaries Co. v. Nebraska L. M. Ins. Ass'n.*, 106 Neb. 80, 84, 182 N.W. 582, 584 (1921).

[19] *Johnson v. Stover*, 218 Neb. 250, 354 N.W.2d 142 (1984).

[20] *Story v. Gammell*, 68 Neb. 709, 712, 94 N.W. 982, 983 (1903).

[21] *Johnson v. Stover, supra* note 19.

[22] *Lincoln Equipment Co. v. Eveland*, 173 Neb. 174, 112 N.W.2d 755 (1962).

[23] *Fadden v. Sun Ins. Office*, 124 Neb. 712, 248 N.W. 62 (1933).

(c) Is There Clear and Convincing Evidence That Isvik's Intent When She Signed and Mailed Her Letter to Bank Was Not to Revoke Trust, but, Rather, to Discharge Bank as Trustee?

The parties do not question Isvik's competency at the time she signed and mailed the letter. Isvik was a college graduate, was in good health, and appeared mentally alert and capable of handling her own affairs. Although her vision was impaired, she was able to read legal documents with the assistance of a mechanical device.

The evidence of Isvik's intent when she signed and mailed the letter to the Bank is primarily circumstantial and supports conflicting inferences. There is evidence to support a reasonable inference that Isvik intended to discharge the Bank as trustee but not revoke her trust. Several witnesses testified that Isvik was dissatisfied with the Bank's performance as trustee. Rickert testified that Isvik was upset with the Bank for not redistributing the assets between her trust and her husband's trust. She also indicated that Isvik was disturbed by the Bank's suggestion that she use her Social Security benefits for living expenses. Capps stated that Isvik was upset with the manner in which the Bank was handling distributions from her trust. Oldaker admitted that at their July 2005 meeting, Isvik expressed dissatisfaction with how the Bank was distributing money.

Lynch, as Isvik's attorney, had been aware of her dissatisfaction with the Bank's performance. When he received a copy of her letter, he called her to discuss her intent and determine his future role. From her response, he formed an initial impression that she intended to revoke the trust. However, after further discussion, he concluded that she intended to remove the Bank as trustee but not revoke the trust. In a similar vein, Oldaker testified that when he spoke with Isvik on the telephone after receiving her letter, he concluded that she wished to serve as her own trustee but not revoke her trust. He stated that Isvik indicated she did not want her estate to pass through probate.

Evidence of Isvik's fondness for the charities designated as trust beneficiaries also supports an inference that she did not intend to revoke the trust. Capps testified that Isvik had spoken

highly of the charities and stated that she wanted them to eventually receive the trust assets. Isvik's attorney testified that the documents he prepared after his telephone conversation with Isvik made no changes in the trust beneficiaries.

But there is also evidence supporting an inference that Isvik intended precisely what she said in her letter to the Bank. Isvik had previously signed documents prepared by her attorney which changed the designation of her trustee. None of these documents utilized language indicating revocation of the trust. Rickert testified that during a conversation with Isvik in July 2005, Isvik stated that she disliked having someone else owning her house and that she had said, "'I don't want the trust. I don't know why I need a trust. I can't see the point of the trust.'" Rickert also testified that when she accompanied Isvik to the Bank to meet with trust officers in July, Isvik expressed to Rickert, prior to the meeting, her desire to revoke the trust, but then agreed to allow the Bank more time to improve its performance. Rickert also testified that during a telephone conversation on August 25, Isvik stated that she had sent a letter to the Bank revoking her trust and that she felt "'relieved.'"

Capps testified that Isvik had discussed revoking her trust and that she believed she needed to do so in order to manage her own money. There is also evidence that Isvik understood that she could create a new trust after revoking the existing one. Capps testified that LaVohn was considering a new trust "to be used after [her] death or in [an] emergency."

As noted above, the testimony of Lynch regarding his telephone conversation with her following receipt of a copy of her letter to the Bank could support an inference of mistake. But the testimony could also be understood to mean that Isvik actually intended to revoke the trust at the time she signed and mailed the letter, but then changed her mind after discussing the matter with Lynch. Such a "post-execution change of mind" would not afford a basis for reformation.[24]

[11,12] Because our review is de novo, we must reach an independent conclusion as to whether there is clear and

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[24] Restatement (Third) of Property: Wills and Other Donative Transfers § 12.1, *comment h.* at 374 (2003).

convincing evidence that the unambiguous language used by Isvik was the product of mistake and that her true intent was only to discharge the Bank as trustee. Clear and convincing evidence is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved.[25] It has been described as "more than a preponderance of evidence, but less than proof beyond a reasonable doubt."[26] Evidence may be clear and convincing despite the fact that other evidence may contradict it.[27] But even taking into consideration that the trial court saw and heard the testimony of the witnesses, we conclude that the conflicting evidence as to Isvik's intent is at least evenly balanced. Based upon our review of this record, we cannot reach a firm belief or conviction that Isvik mistakenly expressed her true intent in her letter to the Bank. Accordingly, we conclude that the county court erred in reforming the unambiguous written notice of revocation which Isvik submitted to the trustee.

V. CONCLUSION

For the reasons discussed, we conclude that the county court did not err in receiving extrinsic evidence of Isvik's intent when she signed and mailed her letter to the Bank, in which letter she unambiguously stated that she was revoking her trust. Based upon our de novo review, we conclude that it has not been proved by clear and convincing evidence that Isvik's statement of her intent was the product of a mistake. The trust was revoked and ceased to exist prior to Isvik's death. Accordingly, we reverse the judgment of the county court and remand the cause with directions to vacate its order of March 10, 2006, and dismiss the trust administration proceeding.

REVERSED AND REMANDED WITH DIRECTIONS.

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[25] *Nebraska Legislature on behalf of State v. Hergert*, 271 Neb. 976, 720 N.W.2d 372 (2006).

[26] *In re Interest of Eden K. & Allison L.*, 14 Neb. App. 867, 875, 717 N.W.2d 507, 514 (2006); *In re Interest of Kindra S.*, 14 Neb. App. 202, 705 N.W.2d 792 (2005).

[27] *In re Estate of Brionez*, 8 Neb. App. 913, 603 N.W.2d 688 (2000).

ALAN H. GOODMAN AND KATHLEEN M. BRENNAN, APPELLANTS, v. CITY OF OMAHA ET AL., APPELLEES.

742 N.W.2d 26

Filed November 30, 2007. No. S-06-532.

1. **Zoning: Appeal and Error.** On appeal, a district court may disturb the decision of a zoning appeals board only when the decision was illegal or is not supported by the evidence and is thus arbitrary, unreasonable, or clearly wrong.
2. ____: ____. In reviewing a decision of the district court regarding a zoning appeal, the standard of review is whether the district court abused its discretion or made an error of law.
3. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
4. **Jurisdiction: Words and Phrases.** Jurisdiction is defined as a court's power or authority to hear a case.
5. **Jurisdiction: Appeal and Error.** An appellate court acquires no jurisdiction unless the appellant has satisfied the requirements for appellate jurisdiction.
6. **Final Orders: Time: Appeal and Error.** Pursuant to Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006), an appeal must be filed within 30 days of the final order from which an appeal is taken.
7. **Motions for New Trial: Pleadings: Time: Appeal and Error.** Generally, the running of the statutory time for filing an appeal may be tolled upon the filing of a motion for new trial or a motion to alter or amend.

Appeal from the District Court for Douglas County: THOMAS A. OTEPKA, Judge. Appeal dismissed.

William J. Brennan for appellants.

Alan M. Thelen, Assistant Omaha City Attorney, for appellee City of Omaha.

J. William Gallup for appellees Anthony L. Gross et al.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MCCORMACK, J.

NATURE OF CASE

The Omaha Zoning Board of Appeals (the Board) approved for a 5-year time period a request for a variance by Midwest Accounting & Tax Service, Inc. (Midwest). Alan H. Goodman and Kathleen M. Brennan (the appellants) filed a petition appealing

this approval to the district court for Douglas County. The district court affirmed the decision of the Board and dismissed the appellants' appeal. Within 10 days of the district court's order, the appellants filed a motion for new trial and a motion to alter or amend. The district court denied the appellants' motions, and the appellants perfected this appeal.

BACKGROUND

Anthony L. Gross, trustee of the Richard Gross Living Trust, was issued a violation by the City of Omaha Planning Department as a result of Midwest's operation of an accounting and tax business out of a residential home located in Omaha, Nebraska. Gross was directed to remove the operation of Midwest from the dwelling or comply with the Omaha Municipal Code. Midwest applied to the Board for a variance from Omaha zoning ordinances in order to continue conducting its business from the residence. Midwest, which had operated at the residential location since 1976 and employed four full-time employees and one part-time employee during the busy season, based its application on unnecessary hardship. On June 16, 2005, the Board approved Midwest's request, subject to the following restrictions: Midwest is allowed to operate at the residential location for a maximum of 5 years, Midwest is not allowed to advertise on the property, and Midwest is not allowed to employ more employees than the number it currently employed.

The appellants filed a petition on appeal with the district court. At the hearing before the court, the appellants offered 14 exhibits, which included the bill of exceptions from the proceedings before the Board. The court received into evidence exhibits 1 and 2, which composed the bill of exceptions, and exhibit 13 which was a copy of an Omaha ordinance. The court sustained objections made to the remaining exhibits.

On January 13, 2006, the district court entered an order affirming the decision of the Board and dismissing the appellants' appeal. The court found that the Board's decision was legal, was supported by the evidence, and was not arbitrary, unreasonable, or clearly wrong. On January 23, the appellants filed a motion for new trial and a motion to alter or amend the judgment or

order. The district court overruled the appellants' motions on April 13. On May 12, the appellants filed this appeal.

ASSIGNMENTS OF ERROR

The appellants contend the district court erred in (1) overruling their motion for new trial and motion to alter and amend the judgment, (2) allowing conduct prohibited by Omaha zoning ordinances when Midwest was in violation of those ordinances when it filed its request for a variance, (3) failing to receive into evidence newly discovered evidence, (4) affirming the variance granted by the Board when the record contained no evidence of hardship, (5) affirming the Board's decision when state statute allows the Board to grant variances only where the spirit of the ordinance shall be observed, (6) finding that an inconvenience translates into a hardship for Midwest, and (7) allowing a board member to have prehearing contact with two of Midwest's stockholders on three occasions.

STANDARD OF REVIEW

[1,2] On appeal, a district court may disturb the decision of a zoning appeals board only when the decision was illegal or is not supported by the evidence and is thus arbitrary, unreasonable, or clearly wrong.[1] In reviewing a decision of the district court regarding a zoning appeal, the standard of review is whether the district court abused its discretion or made an error of law.[2]

ANALYSIS

[3] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.[3] Accordingly, before we address the merits of the appellants' claims, we must first determine whether we have jurisdiction over this appeal.

[4-7] Jurisdiction is defined as a court's power or authority to hear a case.[4] An appellate court acquires no jurisdiction unless

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[1] *Lamar Co. v. Omaha Zoning Bd. of Appeals*, 271 Neb. 473, 713 N.W.2d 406 (2006).

[2] *Id.*

[3] *Williams v. Baird*, 273 Neb. 977, 735 N.W.2d 383 (2007).

[4] *Kuhlmann v. City of Omaha*, 251 Neb. 176, 556 N.W.2d 15 (1996).

the appellant has satisfied the requirements for appellate jurisdiction.[5] Pursuant to Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006), an appeal must be filed within 30 days of the final order from which an appeal is taken. Generally, the running of the statutory time for filing an appeal may be tolled upon the filing of a motion for new trial or a motion to alter or amend.[6]

Within 10 days of the district court's January 13, 2006, order, which affirmed the decision of the Board, the appellants filed both a motion for new trial and a motion to alter or amend. The appellants did not file their notice of appeal until May 12, which was within 30 days of the district court's April 13 order overruling the appellants' motion for new trial and motion to alter or amend. The jurisdictional question before this court is whether the appellants' motions tolled the statutory time for filing an appeal.

Motion for New Trial

We have stated:

> A motion for a new trial is restricted to a trial court, and where the district court acts in the capacity of an appellate court, such a motion is not a proper pleading and it does not stop the running of time for perfecting an appeal. This is true whether that court is hearing appeals from the county court or from some other lower tribunal.[7]

In *Hueftle v. Northeast Tech. Community College*,[8] we concluded that a motion for new trial filed with the district court did not toll the time within which to file an appeal where the district court functioned as an intermediate court of appeals. In *Hueftle*, the appellee filed a petition in error in the district court from the Northeast Technical Community College Board of Governors'

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[5] *Manske v. Manske*, 246 Neb. 314, 518 N.W.2d 144 (1994).

[6] See *Jackson v. Board of Equal. of City of Omaha*, 10 Neb. App. 330, 630 N.W.2d 680 (2001).

[7] *Interstate Printing Co. v. Department of Revenue*, 236 Neb. 110, 112-13, 459 N.W.2d 519, 522 (1990). See, also, *Morello v. City of Omaha*, 5 Neb. App. 785, 565 N.W.2d 41 (1997).

[8] *Hueftle v. Northeast Tech. Community College*, 242 Neb. 685, 496 N.W.2d 506 (1993).

decision terminating the employment of the appellee. The district court vacated the board's decision, and the board filed a motion for new trial. The district court denied the board's motion, and the board appealed. The board's appeal was filed less than 30 days after the district court denied its motion, but more than 30 days after the court's order vacating the board's decision was entered.

We explained in *Hueftle* that although a motion for new trial may be appropriately filed in a trial court,

> "[i]t is improper to move for a new trial in a court which reviewed the decision of a lower court or administrative agency and thus functioned not as a trial court but as an intermediate court of appeals. . . . It necessarily follows then that the filing of a motion for new trial in a court which functioned as an intermediate court of appeals does not stop the running of the time within which to perfect an appeal from the reviewing court."[9]

The present case concerns an appeal from a zoning board of appeals to the district court. Decisions of the zoning board of appeals are reviewable by a district court pursuant to Neb. Rev. Stat. §§ 14-413 and 14-414 (Reissue 1997).[10] Section 14-413 provides that a zoning board of appeals' decision may be reviewed by a district court, but the scope of the district court's review is limited to the legality or illegality of the board's decision. Section 14-414 provides that the district court's authority is limited to the power to reverse, modify, or affirm the decision brought before that court for review. In *Kuhlmann v. City of Omaha*,[11] we characterized the district court's role in appeals from a zoning appeals board as an appellate court. Because the district court in this case functioned as an intermediate court of appeals, and not as a trial court, the appellants' motion for new trial did not stop the running of the time within which to perfect an appeal.

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[9] *Id.* at 687, 496 N.W.2d at 507 (citation omitted).

[10] *Kuhlmann v. City of Omaha, supra* note 4.

[11] *Id.*

Motion to Alter or Amend

The appellants did not file an appeal within 30 days of the district court's January 13, 2006, order. Because the appellants' motion for new trial did not toll the time within which to file an appeal, this court lacks jurisdiction of this appeal unless the 30-day time period was tolled by the appellants' motion to alter or amend.

Like a motion for new trial, a timely motion to alter or amend tolls the time for filing a notice of appeal.[12] Neb. Rev. Stat. § 25-1329 (Cum. Supp. 2006) provides in part, "A motion to alter or amend a judgment shall be filed no later than ten days after the entry of the judgment." Neb. Rev. Stat. § 25-1301(1) (Cum. Supp. 2006), defines a judgment as "the final determination of the rights of the parties in an action." We described "judgment" in *Strunk v. Chromy-Strunk*[13] as "a court's final consideration and determination of the respective rights and obligations of the parties to an action as those rights and obligations presently exist."

As noted above, the district court in this case was functioning as an intermediate court of appeals. The order issued by the district court was not a judgment, but, rather, was an appellate decision reviewing the judgment rendered by the Board. Accordingly, we determine that under these circumstances, the appellants' motion to alter or amend was not an appropriate motion to file after the district court's decision and did not toll the time for filing a notice of appeal.

CONCLUSION

Because the appellants did not file a notice of appeal within 30 days of the district court's January 13, 2006, order and because the time period in which to file an appeal was not tolled, this court does not have jurisdiction over the appellants' appeal.

Appeal dismissed.

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[12] See *Allied Mut. Ins. Co. v. City of Lincoln*, 269 Neb. 631, 694 N.W.2d 832 (2005).

[13] *Strunk v. Chromy-Strunk*, 270 Neb. 917, 929, 708 N.W.2d 821, 834 (2006).

IN RE GUARDIANSHIP AND CONSERVATORSHIP OF LINDA S. CORDEL, AN INCAPACITATED AND PROTECTED PERSON. HARRY Y. WOLFSON, APPELLANT, V. WILLIAM E. SEIDLER, JR., GUARDAN AND CONSERVATOR OF LINDA S. CORDEL, APPELLEE.

741 N.W.2d 675

Filed November 30, 2007. No. S-06-591.

1. **Guardians and Conservators: Appeal and Error.** An appellate court reviews guardianship and conservatorship proceedings for error appearing on the record made in the county court.
2. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Jurisdiction.** The question of jurisdiction is a question of law.
4. **Statutes.** The meaning of a statute is a question of law.
5. **Judgments: Appeal and Error.** On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
6. **Guardians and Conservators: Interventions: Standing: Words and Phrases.** Under Neb. Rev. Stat. § 30-2645(a) (Reissue 1995), any person interested in the welfare of a protected person has standing to intervene, and that person is not limited by the definition of "interested person" found in Neb. Rev. Stat. § 30-2209(21) (Cum. Supp. 2006).
7. **Guardians and Conservators: Accounting: Evidence.** There is no final adjudication of an intermediate account of a conservator without an evidentiary hearing.

Appeal from the County Court for Douglas County: LAWRENCE BARRETT, Judge. Reversed and remanded for further proceedings.

Clayton Byam, Thomas F. Hoarty, Jr., and Daniel T. Hoarty, of Byam & Hoarty, for appellant.

W. Matthew Semple, of Seidler & Seidler, P.C., for appellee, and William E. Seidler, Jr., of Seidler & Seidler, P.C., pro se.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MCCORMACK, J.

BACKGROUND

Harry Y. Wolfson is the father of Linda S. Cordel, an incapacitated adult, and is also trustee of a trust for her

benefit. Wolfson appeals an order of the county court approving $80,002.81 in fees and expenses for Cordel's guardian and conservator. Wolfson asserts that the county court erred in approving an intermediate account without first conducting an evidentiary hearing, which he had requested. The guardian and conservator asserts that Wolfson lacked standing to intervene in the accounting[1] and to prosecute this appeal.[2]

FACTS

Cordel is approximately 53 years old and has multiple sclerosis. Her condition makes decisionmaking difficult and requires care in an assisted living facility. Cordel appointed Wolfson as her attorney in fact pursuant to a contingent plenary durable power of attorney.[3] Additionally, it is undisputed that Wolfson is the trustee of a discretionary trust benefiting Cordel, and he voluntarily signed a personal guaranty of the payments for the assisted living facility where Cordel is currently residing.

In October 2002, Cordel's husband petitioned for the appointment of a guardian and conservator for Cordel, nominating himself as guardian and conservator. Wolfson objected to the allegation of need for a guardian or conservator, but cross-petitioned that in the event Cordel were declared incapacitated, Wolfson should be appointed guardian and conservator. The court ultimately appointed an agreed-upon neutral party, William E. Seidler, Jr., as guardian and conservator. Cordel's marriage has since been dissolved.

This appeal concerns the court's approval of an intermediate account of Seidler's fees and expenses. Seidler filed a motion for approval of accounting and fees on March 24, 2006. The motion was accompanied by a sworn affidavit and an attached itemization detailing $80,002.81 in fees and expenses over the previous 4 years. All work relating to the guardianship and conservatorship, including making telephone calls and reviewing bills, was charged at either Seidler's hourly rate of $125 or the

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[1] See Neb. Rev. Stat. §§ 30-2209(21) (Cum. Supp. 2006) and 30-2645(a) (Reissue 1995).

[2] See Neb. Rev. Stat. § 30-1601 (Cum. Supp. 2006).

[3] See Neb. Rev. Stat. § 49-1515 (Reissue 2004).

lower rates of his legal assistants. The totals were 478.6 hours at $125 per hour, 74.7 hours at $94.38 per hour, and 234.3 hours at $50 per hour. The itemization claimed $631.21 in costs incurred and $781.60 in expenses.

Wolfson filed, as "the father of the Incapacitated and Protected Person and an interested party herein," an objection to the fees and moved the court for an evidentiary hearing on his objection. Seidler filed a motion to strike based on the alleged failure of Wolfson to indicate his standing in the proceedings. A hearing on the motions was held on April 26, 2006. Wolfson's attorney responded to Seidler's motion to strike by arguing at the hearing that Wolfson had standing as a person interested in Cordel's welfare.[4] When a person identified in the record only as "a male voice," presumably Seidler or his attorney, suggested that Wolfson did not have standing, the court said, "Yeah, we've been through it several times; I agree." A "male voice," presumably Wolfson or his attorney, argued that he believed $80,000 was a large sum and that an evidentiary hearing should be held to determine whether that amount was fair and reasonable. The court, without receiving any evidence or listening to any testimony or argument regarding the reasonableness of the fees, approved the fees. The court concluded: "Well, it'll be appealed no matter what their [sic] ruling is, because [Wolfson] is not going to agree to pay . . . Seidler; never wanted to in the first place. I'm going to show your objection is made and it's overruled. The fees are approved." A written order was issued that same day approving the fees, but indicating, on a standardized form, that "no objections to the accounting (or allowance of fees) has/have been filed." Wolfson appeals.

ASSIGNMENT OF ERROR

Wolfson assigns that the county court erred when it granted Seidler's application for fees without receiving any evidence as to the reasonableness of the fee application and without holding an evidentiary hearing on the fee application.

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[4] See § 30-2209(21).

STANDARD OF REVIEW

[1,2] An appellate court reviews guardianship and conservatorship proceedings for error appearing on the record made in the county court.[5] When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.[6]

[3-5] The question of jurisdiction is a question of law.[7] The meaning of a statute is also a question of law.[8] On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.[9]

ANALYSIS

The county court's April 26, 2006, order did not specifically address Wolfson's motion for an evidentiary hearing, but approved the intermediate account after stating that "no objections" were filed. While the court stated at the hearing that Wolfson's objection was "overruled," the court also indicated it did not believe Wolfson had standing to object. Based on the record before us, we conclude that the basis of the county court's decision was its conclusion that Wolfson lacked standing to intervene to request an evidentiary hearing.

Wolfson asserts that in his personal capacity and in his capacity as the trustee of a trust of which Cordel is a beneficiary, he has standing to intervene in the intermediate account because he is an "[i]nterested person" to the proceedings as defined in § 30-2209(21), which states in full:

> Interested person includes heirs, devisees, children, spouses, creditors, beneficiaries, and any others having a property right in or claim against a trust estate or the estate of a decedent, ward, or protected person which may

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[5] See *In re Guardianship & Conservatorship of Trobough*, 267 Neb. 661, 676 N.W.2d 364 (2004).

[6] *Id.*

[7] *Nebraska Dept. of Health & Human Servs. v. Struss*, 261 Neb. 435, 623 N.W.2d 308 (2001).

[8] *In re Estate of Nemetz*, 273 Neb. 918, 735 N.W.2d 363 (2007).

[9] *In re Estate of Mousel*, 271 Neb. 628, 715 N.W.2d 490 (2006).

> be affected by the proceeding. It also includes persons having priority for appointment as personal representative, and other fiduciaries representing interested persons. The meaning as it relates to particular persons may vary from time to time and must be determined according to the particular purposes of, and matter involved in, any proceeding.

Wolfson also asserts that he has standing as a "person interested in the welfare" of Cordel, a protected person, as provided for in § 30-2645(a). Section 30-2645, entitled "Petitions for orders subsequent to appointment," states:

> (a) Any person interested in the welfare of a person for whom a conservator has been appointed may file a petition in the appointing court for an order (1) requiring bond or security or additional bond or security, or reducing bond, (2) requiring an accounting for the administration of the trust, (3) directing distribution, (4) removing the conservator and appointing a temporary or successor conservator, or (5) granting other appropriate relief.

Seidler argues that Wolfson does not have standing to ask for an evidentiary hearing. Seidler asserts that the "[a]ny person interested" language of § 30-2645(a) is constrained by the definition of "[i]nterested person" in § 30-2209(21). Seidler argues that § 30-2209(21) is narrowly limited to the categories of persons specifically listed. According to Seidler, Wolfson does not qualify under any of these categories.

In *In re Guardianship of Gilmore*,[10] the Nebraska Court of Appeals considered whether the Department of Health and Human Services had standing to petition for the removal of a guardian. The court noted that the part of § 30-2209(21) which states that the meaning of "interested person" would vary from time to time, and be determined according to the particular purposes of and matter involved in any proceeding, "would appear to give that otherwise narrow definition considerable breadth."[11] Ultimately, though, the court relied on a provision which gave

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[10] *In re Guardianship of Gilmore*, 11 Neb. App. 876, 662 N.W.2d 221 (2003).

[11] *Id.* at 881, 662 N.W.2d at 225.

standing to petition for removal of a guardian to "'any person interested in [the] welfare'" of the ward.[12] The court found the phrase "any person interested," although not specifically defined in the probate code, to be broader than the definition of "interested person" contained in § 30-2209(21).

The court in *In re Guardianship of Gilmore* noted that the phrase "person interested in the welfare" of a protected person appears only in those statutes dealing with protected persons. The court concluded that the phrase showed a legislative intent "to allow persons who are interested in a protected person, but who do not satisfy the definition of 'interested person,' to bring matters affecting the welfare of protected persons to the attention of the local probate court."[13] In other words, the statutes referring to "any person interested in the welfare" of a protected person "are worded to allow people without a legal interest to bring the matter to the local court's attention."[14]

In *In re Conservatorship of Kloss*,[15] the Supreme Court of Montana similarly considered the meaning of "'*any* person who is interested in [the protected person's] welfare,'" in a statute specifying who had standing to petition for the appointment of a conservator. The court held that an attorney who sought to intervene was not required to have a personal stake in the outcome in order to have standing. While other statutory provisions relating to conservatorships contained "interested person" terminology similar to that contained in § 30-2209(21), the court stated that it refused to limit the language of the more specific statute with the narrower definition of "interested person." The court noted that the narrower definition of "interested person" stated that its meaning "'may vary from time to time and must be determined according to the particular purposes of and matter involved in any proceeding'" and found the statutory provision for "'any person who is interested'" in the welfare

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[12] *Id.*

[13] *Id.* at 881-82, 662 N.W.2d at 225-26.

[14] See *id.* at 882, 662 N.W.2d at 226.

[15] *In re Conservatorship of Kloss*, 326 Mont. 117, 119, 109 P.3d 205, 207 (2005) (emphasis in original).

of the protected person to be more directly relevant.[16] This, the court concluded, reflected the Legislature's intent to broadly define those who have standing to petition the court on behalf of another.[17]

We agree with the foregoing analysis. We note that the term "interested person" is found primarily in provisions of the probate code relating to the administration of decedents' estates.[18] In contrast, the "[a]ny person interested in the welfare" language of § 30-2645(a) is found only in statutes concerning the welfare of an incapacitated person. This departure from the financial interests specified in § 30-2209(21) is appropriate, given the different focus of proceedings involving protected persons.

[6] We thus conclude that Wolfson's standing to intervene in his daughter's guardianship and conservatorship is not limited to one of the narrow categories listed in § 30-2209(21). In construing a statute, we will give the statute its plain and ordinary meaning and we will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.[19] The plain meaning of § 30-2645(a) is evident: "*Any* person interested in the welfare of a person for whom a conservator has been appointed" has standing to intervene. (Emphasis supplied.) To limit the persons "interested in the welfare" of the protected person to those listed in § 30-2209(21) would be superfluous and incongruent with the term "any."[20] It would also be contrary to the language of § 30-2209(21) itself, which specifically states that the meaning of an "[i]nterested person" may vary.

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[16] *Id.* at 120, 109 P.3d at 207.

[17] See *id.* See, also, *In re Estate of Edwards*, 794 P.2d 1092 (Colo. App. 1990).

[18] See Neb. Rev. Stat. §§ 30-2220 and 30-2467 (Cum. Supp. 2006) and 30-2325, 30-2356, 30-2406, 30-2410, 30-2416, 30-2421, 30-2425, 30-2427, 30-2432, 30-2438, 30-2440, 30-2443, 30-2445 through 30-2450, 30-2457, 30-2473, 30-2474, 30-2476, 30-2482, 30-24,103, 30-24,122, and 30-24,124 (Reissue 1995).

[19] See *Japp v. Papio-Missouri River NRD*, 273 Neb. 779, 733 N.W.2d 551 (2007).

[20] See § 30-2645(a).

Seidler next argues that even if § 30-2645(a) is interpreted broadly, Wolfson failed to demonstrate his interest in Cordel's welfare. The Court of Appeals in *In re Guardianship of Gilmore*[21] stated that "the county judge, under the applicable standard of review, can make the determination of whether the petitioner is really interested in the welfare of the person subject to the proceedings." Seidler concedes that "a father is quite likely interested in the welfare of his child."[22] He reads *In re Guardianship of Gilmore*, however, as stating that this interest must be independently evidenced by the record, regardless of whether the genuine interest was challenged below. Seidler then points out that there was no evidence offered or received at the April 26, 2006, hearing before the county court.

The fact that someone is the parent of the protected person would normally be strong evidence of interest in the protected person's welfare. Parents are specifically given standing for other proceedings such as the appointment of a guardian,[23] appointment of a conservator, or other protective order.[24] In addition, Neb. Rev. Stat. § 30-2654(a)(1) (Reissue 1995) states that the conservator, after appointment, is to "consider recommendations relating to the appropriate standard of support, education and benefit for the protected person made by a parent." Still, we agree with Seidler that under § 30-2645(a), being a parent of the protected person does not guarantee standing.

We disagree, however, with Seidler that standing was properly denied in this case. Wolfson cannot be prejudiced for the failure to present evidence on standing when the very issue Wolfson complains of is the county court's refusal to grant Wolfson's request for an evidentiary hearing. Seidler's only challenge to Wolfson's standing was made the day the court heard the motions. Seidler made no specific allegation nor

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[21] *In re Guardianship of Gilmore, supra* note 10, 11 Neb. App. at 882, 662 N.W.2d at 226.

[22] Brief for appellee at 16.

[23] Neb. Rev. Stat. §§ 30-2617 (Reissue 1995) and 30-2625 and 30-2627 (Cum. Supp. 2006).

[24] Neb. Rev. Stat. §§ 30-2633, 30-2634, and 30-2639 (Cum. Supp. 2006).

presented evidence indicating that Wolfson was not, in fact, interested in Cordel's welfare.

It is unclear from this record whether the county court would have granted Wolfson's request for an evidentiary hearing had it found Wolfson to have standing. But we note that we have previously disapproved of a probate court's practice of holding informal discussion instead of an evidentiary hearing. We have, in other circumstances, vacated orders for lack of competent evidence because an evidentiary hearing was not held.[25] We have not specifically addressed intermediate accounts, but Neb. Rev. Stat. § 30-2648 (Reissue 1995) states in relevant part that "[s]ubject to appeal or vacation within the time permitted, an order, *made upon notice and hearing, allowing an intermediate account of a conservator*, adjudicates as to his liabilities concerning the matters considered in connection therewith." (Emphasis supplied.)

The allowance of conservator fees is largely a matter of discretion, and the reasonable value of services is a question of fact.[26] But the deference granted to the county court is based on the fact that it had the opportunity to observe the witnesses and evaluate their credibility.[27] In considering language similar to that of § 30-2648, the court in *In re Trust Created by Will of Enger* explained:

> A requirement of "hearing" in judicial proceedings, aside from any constitutional requirement of due process, by common consent presupposes a proceeding before a competent tribunal for the trial of issues between adversary parties, the presentation and consideration of proofs and

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[25] See *In re Trust of Rosenberg*, 269 Neb. 310, 693 N.W.2d 500 (2005). See, also, *In re Guardianship & Conservatorship of Larson*, 270 Neb. 837, 708 N.W.2d 262 (2006); *In re Guardianship & Conservatorship of Trobough, supra* note 5.

[26] *In re Conservatorship of Mansur*, 367 N.W.2d 550 (Minn. App. 1985). See, also, Neb. Rev. Stat. § 30-2643 (Cum. Supp. 2006); *In re Guardianship & Conservatorship of Karin P.*, 271 Neb. 917, 716 N.W.2d 681 (2006) (whether guardian ad litem fees were reasonable depended on equities and circumstances of each particular case).

[27] See *In re Conservatorship of Mansur, supra* note 26.

> arguments, and determinative action by the tribunal with respect to the questions raised by the issues presented.[28]

[7] We conclude that pursuant to § 30-2648, there is no final adjudication of an intermediate account without an evidentiary hearing. Because no hearing was held in this case, the court shall, after remand, hold a hearing regarding Seidler's fees and expenses.

CONCLUSION

The county court's dismissal of Wolfson for lack of standing is reversed, and the cause is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

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[28] *In re Trust Created by Will of Enger*, 225 Minn. 229, 237-38, 30 N.W.2d 694, 700 (1948). See, also, *Guardianship of Estate of Slakmon*, 83 Cal. App. 3d 224, 147 Cal. Rptr. 777 (1978).

TERRY HICKEY AND THE FRATERNAL ORDER OF POLICE, LODGE NO. 52, APPELLANTS, V. CIVIL SERVICE COMMISSION OF DOUGLAS COUNTY, NEBRASKA, AND DOUGLAS COUNTY, NEBRASKA, APPELLEES.

741 N.W.2d 649

Filed November 30, 2007. No. S-06-802.

1. **Administrative Law: Appeal and Error.** In reviewing an administrative agency decision on a petition in error, both the district court and the appellate court review the decision of the administrative agency to determine whether the agency acted within its jurisdiction and whether the decision of the agency is supported by sufficient relevant evidence.
2. **Constitutional Law: Due Process: Appeal and Error.** The determination of whether the procedures afforded an individual comport with constitutional requirements for procedural due process presents a question of law upon which an appellate court is obligated to reach a conclusion independent of the court below.
3. **Constitutional Law: Due Process: Public Officers and Employees: Termination of Employment: Notice.** When a public employer deprives an employee of a property interest in continued employment, constitutional due process requires that the deprivation be preceded by (1) oral or written notice of the charges, (2) an explanation of the employer's evidence, and (3) an opportunity for the employee to present his or her side of the story.

4. **Administrative Law: Words and Phrases.** "Arbitrary and capricious" action by an administrative agency is action taken in disregard of the facts or circumstances of the case, without some basis which would lead a reasonable and honest person to the same conclusion.

Appeal from the District Court for Douglas County: GREGORY M. SCHATZ, Judge. Affirmed.

John E. Corrigan, of Dowd, Howard & Corrigan, L.L.C., for appellants.

Stuart J. Dornan, Douglas County Attorney, Peter J. Garofalo, and Bernard J. Monbouquette, for appellees.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MCCORMACK, J.

NATURE OF CASE

This case presents a petition in error from the decision of the Douglas County Civil Service Commission (the Commission) to approve the termination of Terry Hickey's employment with Douglas County. This decision was as a consequence of a sick leave violation and other rule violations from the preceding 12 months. Hickey's primary argument is that his termination of employment was based on a sick leave violation that was not listed in the predisciplinary hearing notice and that, therefore, such termination violated his right to due process of law.[1] Hickey also argues that the termination of his employment was disproportionate to the violation.

BACKGROUND

Hickey had been an employee of Douglas County for nearly 16 years. He had been working for approximately 5 years as a security officer at the Douglas County Health Center (the Health Center) before being discharged. On November 1, 2004, Hickey received a 3-day suspension for attempting to place handcuffs on a female employee at the Health Center and for

[1] See *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985).

pulling the hair on the back of her neck. On May 12, 2005, Hickey received a 3-day unpaid suspension and was required to attend sexual harassment training after it was found that he had been verbally inappropriate and used profanity with a female employee of another Douglas County department.

On May 19, 2005, Hickey suffered a fracture to his hand while repairing a truck in his driveway. There is no evidence that this injury occurred while working at outside employment. Because Hickey's security job presented a "potential combative situation," his physician recommended that Hickey not return to his job as a security officer for 4 weeks. Healing went more slowly than expected, and Hickey was not released to work until July 22. From May 19 to July 22, Hickey took paid sick leave from Douglas County.

Besides the "potential risk environment" of his security job, Hickey's physician advised Hickey that he could use his hand within the cast as he was able. Hickey had his own lawn care and snow removal business, and during the time he was on sick leave, he continued to work, mowing and treating lawns for his business.

The Commission's personnel policy manual provides for paid sick leave under article 21, section 2. Section 2(a) states in part, "Employees are prohibited from working in any other employment while utilizing sick leave with pay. Violation of these provisions may result in disciplinary action." Section 2(b), entitled "Definition of Sick Leave," lists reasons for absence that qualify as sick leave. The first of the reasons listed, section 2(b)(1), is "[a]bsence necessitated because of bona fide illness or injury," with the caveat that "employees who become injured as a result of engaging in secondary employment outside of the County service shall not be entitled to sick leave with pay for such injury."

James C. Tourville, the director of the Health Center, sent Hickey a notice of a predisciplinary hearing. The notice listed the Commission rules under which the charges against Hickey had been brought. That list included article 13, section 5(a)(9), misuse of sick leave, and article 21, section 2(a), sick leave. The notice did not specifically list article 21, section 2(b). The notice also listed the November 1, 2004, and May 12, 2005,

disciplinary actions and advised that the current action could constitute multiple instances of disciplinary action within a 12-month period. Under the "Notice of Pending Charges and Explanation of Evidence" portion, it stated in full:

> May 19, 2005
>
> It was brought to Management's attention that you had injured your right hand while off duty.
>
> You informed Management later this same day that your right hand had been fractured and you would need to be off work on medical leave for three (3) weeks.
>
> June 21[,] 2005
>
> It was brought to Management's attention that you were seen unhitching your equipment trailer from your dump truck and that you were working on your second job.
>
> July 12-13, 2005
>
> You were observed using your right hand, without a cast, performing duties associated with your second job. These duties included you turning a valve and cranking the hitch on your trailer with your right hand.
>
> You were also observed using your right hand to support your weight, to pull yourself up on your tractor, and driving the tractor while spraying chemical on a field in Gretna[, Nebraska].
>
> This work was being performed while you were on Sick Leave from Douglas County due to an injury to your right hand.
>
> Your absence from work on Sick Leave continued through July 21, 2005.

Hickey's employment was terminated after the disciplinary hearing. We do not have a record of that proceeding. The notice of disciplinary action sent on July 29, 2005, informed Hickey of his termination of employment. The notice, citing article 21, section 2(a), repeated the explanation of the evidence quoted above and summarized that during the disciplinary hearing, Hickey was told he had been working at his second job while on paid sick leave.

Hickey appealed to the Commission, which held a hearing on October 13, 2005. In opening statements to the Commission, Hickey's counsel stated that to his knowledge, the only reason

Hickey's employment was terminated was because he was alleged to have been engaged in off-duty employment while on sick leave and that termination was excessive. Hickey's counsel argued that Hickey was unaware of the rule against working while on paid sick leave; Hickey's supervisor knew Hickey had a second job, and Hickey's supervisor never advised Hickey of this rule or asked him to stop working during sick leave. The county attorney, in his opening remarks, responded: "And the evidence will show that . . . Hickey not only ignored certain work rules prohibiting the engagement in secondary employment while being on sick leave. The work rules would state that one is disqualified from receiving sick leave benefits when one becomes injured in another line of work." It is undisputed that this was the first time it had ever been suggested that Hickey had violated section 2(b), as opposed to 2(a).

Hickey called Tourville as his first witness. Tourville testified that he was not Hickey's immediate supervisor but that, as director of the Health Center, it was ultimately his decision to terminate Hickey's employment. Hickey's counsel handed Tourville a copy of the notice of disciplinary action Tourville had sent to Hickey, and the following colloquy took place:

> [Hickey's counsel:] Now, is it your understanding of the facts of this case that . . . Hickey was injured while he was engaging in employment outside of the . . . Health Center?
>
> [Tourville:] That's correct.
>
> Q. Who told you that?
>
> A. I don't recall who told me, but I had — I had learned that he — was informed that he had injured himself outside of employment.
>
> . . . .
>
> Q. . . . I'll show you page 21-2 of Exhibit 2 which is part of the personnel manual . . . Do you see where —
>
> . . . .
>
> Q. — it directs that a person is not eligible for sick leave if they're [sic] injured in employment outside of their [sic] employment with the County?
>
> A. Yes, I do.

Q. Was that one of the reasons that you disciplined — you decided to terminate this man?

A. That was the reason he couldn't use sick leave while he was injured outside his — outside of the County employment, yes.

Q. Okay. Well —

A. Yes.

Q. Well, look at [the notice of disciplinary action]. And you show me where you mentioned to him anywhere in there that he violated that work rule.

A. It would be Section — Article 21, Section 2, sick leave, on page two of the letter.

Q. And Section 2(a), sick leave — if I can see this.

A. Uh-huh, sure. It would be on the page before. It starts on the page before that.

Q. Oh, so it wasn't this provision. It was some other provision; right?

A. It's part of that same provision.

Q. Oh, because this is under Section 2(b), isn't it?

A. (No audible response.)

Q. Let's take a look at the whole manual. If you look at Section 2(a), that provides that you can't receive sick leave if you're working off duty; right?

. . . .

Q. . . . So . . . under Section A, were employees advised — that employees are prohibited from working in any — any other employment while utilizing sick leave pay; right?

A. That's correct.

Q. And that's why — that's why you terminated this man; correct?

A. That would be correct.

Q. Okay. So the fact that he was receiving sick leave while he was — because you think he was injured in his employment outside of the County, that didn't have anything to do with it, did it?

A. Rephrase your question.

Q. You see at page 21-2 under Section (b)(1) of this particular article where . . . .

. . . .

Q. . . . [E]mployees who become injured as a result of engaging in secondary employment outside of the County service shall not be entitled to sick leave with pay for such injuries.

. . . .

Q. Now, does that — are you telling me that that had something to do with your decision to discipline this guy?

A. I relied on Article 21 under "discipline" that states that he could not be paid sick leave when he was — when he injured himself on another job outside the County employment.

Q. Did you ever tell him that?

. . . .

A. He had all this at the time of the hearing.

Q. So you are telling us now that you told him that he shouldn't have been on sick leave because he got injured while he was off duty and working in some other employment?

A. That was cited on the letter that we sent to him —

Q. Where?

. . . .

A. What I cited was Article 21, Section 2(a), sick leave.

Q. Okay. And this is Article 21, Section 2(b), isn't it?

A. I cited 2(a).

Q. Okay. So you never told him that you thought he violated Section 2(b)?

A. No, I cited 2(a).

Q. So you would agree that my question — that this statement is correct: That you never told him that you thought he violated Section 2(b) or Article 21?

A. No, I told him 2(a), Section 2(a).

During cross-examination, the county attorney confirmed that Tourville, as the department head, relied on direct supervisors to report on employee infractions. He then reviewed with Tourville the notice of predisciplinary hearing that Tourville sent to Hickey and had Tourville read article 21, section 2(a), "[e]mployees are prohibited from working at any other employment while

utilizing sick leave with pay." Tourville then agreed that it was "fair to say" that "the discipline imposed on July 29, 2005, against . . . Hickey rested on his actions as set forth in the notice of disciplinary action under those particular provisions." Tourville further testified that the discipline rested on the accumulation of violations within a 12-month period.

After Tourville's testimony, Hickey made a motion to dismiss based on Tourville's testimony that the reason he terminated Hickey's employment was his belief that Hickey had been injured in other employment. Hickey argued that it was a clear violation of Hickey's due process rights to have never been advised in the notice of predisciplinary hearing that he had violated article 21, section 2(b). The county attorney responded that Hickey had purposefully called Tourville first in order to confuse him as to what grounds Hickey's discipline was based upon. According to the county attorney, Tourville had clarified on cross-examination that the basis for the sick leave violation was section 2(a) and not section 2(b) and that section 2(a) was listed in Hickey's notice of predisciplinary hearing, as well as his postdisciplinary notice.

The motion to dismiss was denied, and the hearing proceeded with the testimony of Chuck Franek. Franek is the head of security at the Health Center and was Hickey's supervisor. Franek testified that he never inquired about whether Hickey was working a second job when he was injured and that he never had any knowledge that Hickey's injury was incurred in secondary employment. Franek explained that the prohibition against taking sick pay when the absence is due to an on-the-job injury from outside employment had "nothing to do with" Hickey's violation. Instead, Franek explained the violation in question involved working in secondary employment while receiving paid sick leave, a violation under section 2(a).

Photographic evidence was introduced at the hearing showing that Hickey continued to work, maintaining lawns for his lawn care business on dates for which he was receiving paid sick leave. There was no evidence that the hand injury leading to the sick leave was connected with outside employment.

The Commission upheld the Health Center's decision to terminate Hickey's employment, and Hickey filed a petition in

error in the district court. The district court affirmed Hickey's termination of employment. Hickey appeals.

ASSIGNMENTS OF ERROR

Hickey assigns that the district court erred in (1) holding that Hickey received adequate due process at his pretermination and posttermination of employment hearings and (2) upholding the decision of the Commission denying Hickey's appeal of his termination of employment.

STANDARD OF REVIEW

[1] In reviewing an administrative agency decision on a petition in error, both the district court and the appellate court review the decision of the administrative agency to determine whether the agency acted within its jurisdiction and whether the decision of the agency is supported by sufficient relevant evidence.[2]

[2] The determination of whether the procedures afforded an individual comport with constitutional requirements for procedural due process presents a question of law.[3] On a question of law, an appellate court is obligated to reach a conclusion independent of the court below.[4]

ANALYSIS

Hickey first contends that the district court should have reversed his termination of employment because testimony by Tourville at the Commission hearing shows that such termination was based, in whole or in part, on an alleged violation of section 2(b), prohibiting taking paid sick leave when the leave was necessitated by injury incurred in secondary employment. Hickey asserts that because he was not informed of this alleged ground for his discipline, he was not afforded a meaningful opportunity to respond to the allegation, and that his due process rights were violated.

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[2] See, *Maxon v. City of Grand Island*, 273 Neb. 647, 731 N.W.2d 882 (2007); *Ashby v. Civil Serv. Comm.*, 241 Neb. 988, 492 N.W.2d 849 (1992).

[3] *Barnett v. City of Scottsbluff*, 268 Neb. 555, 684 N.W.2d 553 (2004); *Billups v. Nebraska Dept. of Corr. Servs. Appeals Bd.*, 238 Neb. 39, 469 N.W.2d 120 (1991).

[4] See *Barnett v. City of Scottsbluff, supra* note 3.

[3] The parties do not dispute that Hickey had a protected property interest in his continued employment. In *Cleveland Board of Education v. Loudermill*,[5] the U.S. Supreme Court held that when a public employer deprives an employee of a property interest in continued employment, constitutional due process requires that the deprivation be preceded by (1) oral or written notice of the charges, (2) an explanation of the employer's evidence, and (3) an opportunity for the employee to present his or her side of the story.[6] A pretermination of employment procedure functions as "an initial check against mistaken decisions—essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action."[7]

Hickey relies on *Martin v. Nebraska Dept. of Public Institutions*,[8] in which the Nebraska Court of Appeals reversed a termination of employment because of the failure to provide adequate due process. The employee's termination of employment in *Martin* was based in part on charges of insubordination. The employee was notified that he was alleged to have acted insubordinately prior to a pretermination of employment meeting with his employer. However, it was not until after this meeting that an investigation was conducted into the alleged insubordination, which included reviewing documents and interviewing the employees. The information gathered by the investigation was then relied upon by the employer when it decided to terminate his employment. The information from the investigation was not available to the employee until after such termination. The Court of Appeals concluded that the employee was denied due process because he never had an opportunity to rebut the evidence upon which his employment was terminated.

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[5] *Cleveland Board of Education v. Loudermill, supra* note 1.

[6] See, *id.*; *Nebraska Pub. Emp. v. Otoe Cty.*, 257 Neb. 50, 595 N.W.2d 237 (1999); *Unland v. City of Lincoln*, 247 Neb. 837, 530 N.W.2d 624 (1995).

[7] *Cleveland Board of Education v. Loudermill, supra* note 1, 470 U.S. at 545-46.

[8] *Martin v. Nebraska Dept. of Public Institutions*, 7 Neb. App. 585, 584 N.W.2d 485 (1998).

Hickey asserts that his termination of employment was similarly based on grounds of which he was unaware prior to the decision to make such termination. We disagree. The evidence is sufficient to show that Hickey's termination of employment was, in fact, based only on the grounds stated in the predisciplinary notice. Hickey makes no argument that if his employment was actually terminated for a section 2(a) violation, as opposed to a section 2(b) violation, he was denied due process, and we find no due process violation. Hickey was notified that he was subject to discipline for working in outside employment while receiving paid sick leave. He had a chance to respond to this charge at the disciplinary hearing.

It is true that Tourville testified that he terminated Hickey's employment for receiving paid leave when his injury was incurred during secondary employment, in violation of section 2(b). But Tourville also testified, during both direct and cross-examination, that he terminated Hickey's employment for violating the policy of working in secondary employment while receiving paid sick leave, a violation of section 2(a). Nothing in Tourville's testimony demonstrates a belief that Hickey's employment was terminated for both.

Tourville's testimony began with the statement that Hickey was injured outside of his employment with the county—not that he was injured during outside employment. He then said, in response to Hickey's leading questions, Hickey violated the rule that one cannot claim paid sick leave if one's injury was incurred in secondary employment, section 2(b). But later, without expressly acknowledging the inconsistency, Tourville also clearly stated that Hickey's employment was terminated for working in outside employment while receiving paid sick leave, a violation of section 2(a). As we read the record, under examination, Tourville was simply confused. Aside from those portions of Tourville's testimony discussed above, there is nothing in the record to indicate that Hickey's last violation was based on anything other than section 2(a): working in secondary employment while receiving paid sick leave. The notice of predisciplinary hearing cites section 2(a), and the evidence listed as supporting the violation consists of facts relating to Hickey's employment while on sick leave. The postdisciplinary notice of

termination of employment again recites section 2(a) and the evidence relating to Hickey's working in secondary employment while receiving paid sick leave. Franek testified before the Commission that section 2(b) had nothing to do with Hickey's termination of employment and that Hickey's violation instead involved section 2(a). The exhibits offered by the county at the hearing before the Commission were relevant only to Hickey's outside employment during paid sick leave. In short, the record clearly establishes, despite Tourville's confusion, that Hickey's employment was terminated for violating section 2(a) and that he had notice of and the opportunity to defend himself against that charge. We find no due process violation.

Hickey also asserts that regardless of whether he received due process, we should reverse, because the Commission's order was arbitrary and capricious and was unsupported by relevant evidence. On this point, Hickey argues that the suggested disciplinary guidelines of the policy manual set forth only an oral warning or official reprimand for a first offense of misuse of sick leave. In addition, Hickey claims he was unaware of the sick leave policy prohibiting outside employment while on sick leave with pay. Hickey points out that his supervisor, Franek, never asked Hickey if he was working while on sick leave, nor did Franek inform him of this prohibition. In sum, Hickey argues that Tourville was predisposed to terminate Hickey's employment and that such termination was disproportionate to the violation.

[4] Evidence supports an administrative agency's decision reviewed in an error proceeding if the agency could reasonably find the facts for the agency's decision on the basis of the relevant evidence contained in the record before the agency.[9] "Arbitrary and capricious" action by an administrative agency is action taken in disregard of the facts or circumstances of the case, without some basis which would lead a reasonable and honest person to the same conclusion.[10]

There is no dispute that Hickey violated article 21, section 2(a), of the policy manual. Nor does Hickey dispute that he

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[9] *Wagner v. City of Omaha*, 236 Neb. 843, 464 N.W.2d 175 (1991).

[10] *Id.*

signed an acknowledgment of receipt of the policy manual and that he was responsible for following the rules of the manual. Hickey ignores the fact that the reason for his discharge was not just the singular sick leave violation, but that this was his third policy violation in the past 12 months.

The policy manual sets forth discharge as a reasonable consequence of a third violation of either of the rules the county found Hickey had violated on November 1, 2004, and May 12, 2005. The policy manual also recommends discharge as an acceptable consequence of a third violation of sick leave policies. The policy manual explains that although the range of reasonable penalties for various offenses refers only to successive instances of the same offense, single violations of different work rules may also occur. In that case, "the Elected Official/Department Head may wish to take action other than that delineated for the first offense under each violation." Hickey committed such violations, and the recommended discipline is within the range recommended by the county's disciplinary guidelines. As such, we conclude that Tourville's decision to discharge Hickey from his employment was supported by sufficient relevant evidence and was not arbitrary, capricious, or unreasonable.

CONCLUSION

We affirm the decision of the district court which affirmed the Commission's decision to uphold Hickey's discharge from employment.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
JERROLD A. MCLEOD, APPELLANT.
741 N.W.2d 664

Filed November 30, 2007. No. S-07-013.

1. **Postconviction: Constitutional Law: Proof.** An evidentiary hearing on a motion for postconviction relief is required on an appropriate motion containing factual allegations which, if proved, constitute an infringement of the movant's rights under the Nebraska or federal Constitution. When such an allegation is made, an

evidentiary hearing may be denied only when the records and files affirmatively show that the defendant is entitled to no relief.

2. **Postconviction: Proof: Appeal and Error.** A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous.
3. **Postconviction.** Under the Nebraska Postconviction Act, the district court has discretion to adopt reasonable procedures for determining what the motion and the files and records show, and whether any substantial issues are raised, before granting a full evidentiary hearing.
4. **Postconviction: Effectiveness of Counsel: Proof: Appeal and Error.** In order to establish a right to postconviction relief based on a claim of ineffective assistance of counsel, the defendant has the burden first to show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area. Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case. The two prongs of this test, deficient performance and prejudice, may be addressed in either order.
5. **Postconviction: Pleas: Waiver: Effectiveness of Counsel.** Normally, a voluntary guilty plea waives all defenses to a criminal charge. However, in a postconviction action brought by a defendant convicted because of a guilty plea or a plea of no contest, a court will consider an allegation that the plea was the result of ineffective assistance of counsel.
6. **Convictions: Effectiveness of Counsel: Pleas: Proof.** When a conviction is based upon a guilty plea or a plea of no contest, the prejudice requirement for an ineffective assistance of counsel claim is satisfied if the defendant shows a reasonable probability that but for the errors of counsel, the defendant would have insisted on going to trial rather than pleading guilty.
7. **Aiding and Abetting.** The common-law distinction between principal and aider and abettor has been abolished in Nebraska; a person who aids, abets, procures, or causes another to commit any offense may be prosecuted as if he or she were the principal offender.
8. **Constitutional Law: Speedy Trial.** Determining whether a defendant's constitutional right to a speedy trial has been violated requires a balancing test in which the courts must approach each case on an ad hoc basis. This balancing test involves four factors: (1) length of delay, (2) the reason for the delay, (3) the defendant's assertion of the right, and (4) prejudice to the defendant. None of these four factors standing alone is a necessary or sufficient condition to the finding of a deprivation of the right to speedy trial. Rather, the factors are related and must be considered together with other circumstances as may be relevant.
9. **Postconviction: Right to Counsel.** Under the Nebraska Postconviction Act, it is within the discretion of the trial court as to whether counsel shall be appointed to represent the defendant.
10. **Postconviction: Justiciable Issues: Right to Counsel.** When the assigned errors in a postconviction petition before the district court contain no justiciable issues of law or fact, it is not an abuse of discretion to fail to appoint counsel for an indigent defendant.

Appeal from the District Court for Lancaster County: KAREN FLOWERS, Judge. Affirmed.

Jerrold A. McLeod, pro se.

Jon Bruning, Attorney General, and George R. Love for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

STEPHAN, J.

Jerrold A. McLeod is serving a life sentence on a plea-based conviction of first degree murder. He appeals from an order of the district court for Lancaster County denying his motion for postconviction relief without an evidentiary hearing. We find no error and affirm.

I. BACKGROUND

On April 14, 1999, McLeod pled no contest to an amended information charging him with first degree murder. McLeod was 17 years old on the date of sentencing. Prior to accepting the plea, the district court questioned McLeod in order to determine whether his plea was knowingly, voluntarily, and intentionally made. McLeod informed the court that he had recently obtained his diploma through the GED program. He stated he had not taken any alcohol, drugs, or medication in the last 72 hours, nor was he under the care of a psychiatrist. The court determined he was competent.

The court then informed McLeod that his attorney had filed a motion to transfer the cause to juvenile court and that if his plea was accepted, he would be waiving the right to a hearing on that motion. It further informed him that a motion to suppress certain statements he had made was pending and that his plea would mean that the motion would not be heard. McLeod acknowledged that he understood the effect of his plea on those motions. The court then informed McLeod that he was presumed innocent and that he had a right to a jury trial, a right to confrontation, and a right to call witnesses in his defense; all rights that he would be waiving by entering the plea. McLeod

acknowledged that he was aware of the effect of his plea on his constitutional rights.

In addition, the court informed McLeod, "If you are found guilty in this case, you will be found guilty of a felony and that can be used against you later on in life." The court further explained:

> Being convicted for a felony can also lead to the loss of certain of your civil rights, including but not necessarily limited to your right to vote and your right to carry a firearm. . . .
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> . . . .
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> . . . If you should continue to get into trouble of a felony nature, the fact of this conviction could be used at some later time to make the penalty for the later conviction more severe.

The court then specifically stated, "If you are found guilty in this case . . . there is only one penalty that I can impose in this matter and that is a sentence of life imprisonment." McLeod stated that he understood the court's explanation.

The court specifically asked whether anyone had threatened, pressured, or coerced McLeod into giving up the rights it had previously explained, and he responded, "No." McLeod affirmed that other than the plea agreement, he was not promised anything in exchange for giving up his rights. He stated that he understood the rights that were explained to him and that he had no questions about them. McLeod then stated that he was satisfied with the performance of his counsel and that he freely and voluntarily waived his rights. His counsel stated that he was satisfied that McLeod understood his rights and that he knowingly, voluntarily, and intentionally waived them. The court then accepted McLeod's plea.

Thereafter, the State described the terms of the plea agreement. In exchange for McLeod's plea to first degree murder, the State agreed not to file additional charges against him related to the crimes that took place on the day of the murder, including robbery and concealing evidence. In addition, the State agreed not to file charges against McLeod related to a separate burglary committed after the murder and a separate theft committed prior to the murder. The State further agreed not to file any charges

against McLeod relating to an attempt to escape from custody after the murder.

After the plea agreement was described, McLeod again affirmed that he had not been promised anything more than the terms of the plea agreement in exchange for his plea and that no one had threatened, pressured, or coerced him to plead. The State then offered a factual basis for the charge, in which it was explained that McLeod, then 16 years old, possessed and fired a shotgun during a burglary attempt which resulted in the death of one person. After the court accepted the factual basis for the plea, it sentenced McLeod to life in prison. In doing so, the court noted, "I understand that as we have gone through the plea that . . . McLeod knows that I have no discretion in sentencing." Similarly, McLeod's counsel noted "[w]e understand the court has no discretion in sentencing . . . ." Counsel further stated that McLeod "knows he has a life sentence now that he is going to have to serve and hopefully demonstrate during his time in the institution that something good can come out of this horrible tragedy." Counsel further stated that McLeod "understands that for him to get anywhere in life and be considered for something less than [a] life sentence, he has to begin something." After imposing the life sentence, the court informed McLeod:

> What that means . . . is that you remain in prison unless and until your sentence is commuted to a term of years. Until then, you are not eligible for parole. Whether it is ever commuted, is not something that is not [sic] up to me. But at some time, unless the rules change between here and then, it is up to the Board of Pardons.

Neither McLeod nor his counsel offered any objection either before or after the sentence was imposed.

McLeod's trial counsel timely filed a direct appeal, based solely upon a claim that his sentence was excessive. This court granted the State's motion for summary affirmance.[1] On September 7, 2006, McLeod filed a verified motion for postconviction relief, asserting that both his trial and appellate counsel had been ineffective. McLeod also filed motions to proceed in

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[1] *State v. McLeod*, 258 Neb. xxi (No. S-99-717, Nov. 10, 1999).

forma pauperis and for appointment of counsel. After ordering the State to respond to the postconviction motion, the district court denied McLeod postconviction relief without an evidentiary hearing or appointment of counsel. McLeod filed this timely appeal, which we moved to our docket based on our statutory authority to regulate the caseloads of the appellate courts of this state.[2]

II. ASSIGNMENTS OF ERROR

McLeod assigns, restated, consolidated, and renumbered, that the district court erred in (1) ordering the State to respond to his postconviction motion and allowing the State to present evidence on the issue of whether he was entitled to an evidentiary hearing, (2) denying him postconviction relief without an evidentiary hearing, and (3) failing to appoint him counsel.

III. STANDARD OF REVIEW

[1,2] An evidentiary hearing on a motion for postconviction relief is required on an appropriate motion containing factual allegations which, if proved, constitute an infringement of the movant's rights under the Nebraska or federal Constitution. When such an allegation is made, an evidentiary hearing may be denied only when the records and files affirmatively show that the defendant is entitled to no relief.[3] A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous.[4]

IV. ANALYSIS

1. Postconviction Procedure

[3] McLeod's first assignment of error challenges the procedure utilized by the district court in determining, without an evidentiary hearing, that he was not entitled to postconviction

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[2] See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

[3] *State v. Hudson*, 270 Neb. 752, 708 N.W.2d 602 (2005); *State v. Marshall*, 269 Neb. 56, 690 N.W.2d 593 (2005).

[4] *State v. McHenry*, 268 Neb. 219, 682 N.W.2d 212 (2004); *State v. Dean*, 264 Neb. 42, 645 N.W.2d 528 (2002).

relief. Under the Nebraska Postconviction Act,[5] the district court has discretion to adopt reasonable procedures for determining what the motion and the files and records show, and whether any substantial issues are raised, before granting a full evidentiary hearing.[6] We examine such procedures for abuse of discretion, which exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition.[7]

On the day after McLeod filed his verified motion for postconviction relief requesting an evidentiary hearing and a motion for appointment of counsel, the district court entered an order in which it ordered the State to file a written response to the postconviction motion and deferred ruling on the motion for appointment of counsel until it had made a determination as to whether an evidentiary hearing was required. The State filed a response in which it moved to deny an evidentiary hearing on the ground that the files and records showed that McLeod was not entitled to the relief sought in his motion. McLeod filed an objection to the procedure utilized by the court in requiring the State to respond to his motion, and he moved to recuse the district judge.

The district court conducted a hearing on McLeod's procedural objection and motion to recuse and the State's motion to deny an evidentiary hearing on the postconviction claim. McLeod participated in the hearing by telephone. The court overruled McLeod's objection and motion and then received two exhibits offered by the State: the bill of exceptions and judge's minutes from McLeod's 1999 plea and sentencing proceedings. At the close of the hearing, the court took the matter under submission and later entered a written order denying postconviction relief.

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[5] Neb. Rev. Stat. §§ 29-3001 to 29-3004 (Reissue 1995).

[6] *State v. Dean, supra* note 4.

[7] *Id.*; *State v. Hamik*, 262 Neb. 761, 635 N.W.2d 123 (2001).

The procedure followed by the district court in this case is similar to that which we upheld in *State v. Dean.*[8] There, we noted that it was not unusual for a court to conduct a hearing to determine which files and records it may examine before determining whether to grant an evidentiary hearing on a motion for postconviction relief and that the procedure did not deprive the prisoner of a substantial right. We conclude, as we did in *Dean*, that the district court did not abuse its discretion with respect to procedures it utilized for reviewing files and records of McLeod's conviction and sentence.

2. Denial of Postconviction Relief

In his motion for postconviction relief, McLeod alleged that he was denied rights secured by the 6th and 14th amendments to the U.S. Constitution and Neb. Const. art. I, § 11, because his counsel was ineffective in advising him regarding his plea and in representing him on appeal from his conviction and sentence. We note that McLeod was represented by the same lawyer at the time of his plea and on direct appeal, and accordingly, this postconviction proceeding was his first opportunity to assert claims of ineffective assistance of counsel.[9]

[4-6] In order to establish a right to postconviction relief based on a claim of ineffective assistance of counsel, the defendant has the burden first to show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area. Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case. The two prongs of this test, deficient performance and prejudice, may be addressed in either order.[10] Normally, a voluntary guilty plea waives all defenses to a criminal charge. However, in a postconviction action brought by a defendant convicted because of a guilty plea or a plea of no contest, a court will consider an allegation that the plea was the result of ineffective assistance

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[8] *State v. Dean, supra* note 4.

[9] See *State v. Jones*, 264 Neb. 671, 650 N.W.2d 798 (2002).

[10] *State v. Barnes*, 272 Neb. 749, 724 N.W.2d 807 (2006).

of counsel.[11] When a conviction is based upon a guilty plea or a plea of no contest, the prejudice requirement for an ineffective assistance of counsel claim is satisfied if the defendant shows a reasonable probability that but for the errors of counsel, the defendant would have insisted on going to trial rather than pleading guilty.[12]

Given that relief was denied without an evidentiary hearing, we must determine whether McLeod alleged facts which support his claim that he was denied effective assistance of counsel; and if so, whether the files and records affirmatively show that he is entitled to no relief.[13]

(a) Inducement of Plea

McLeod alleged in his postconviction motion that his counsel was ineffective "for having induce [sic] [McLeod] to accept the plea agreement by assuring him that 'more than likely you'll be released before age forty', all the while knowing that [McLeod] would be given a life sentence if he plead [sic] to the charge of Murder in the First Degree." McLeod further alleged that his attorney advised him that if he were to take responsibility for his actions and show remorse, "'Someday, they'll see your case and take into account your age, nature of the crime and circumstances that lead [sic] to this grave tragedy.'" McLeod alleged that this led him to believe that he would in fact be sentenced to a term of years and that had he understood the reality of his situation, he would have refused to plead and insisted upon a trial.

As reflected in the record of the plea hearing, McLeod specifically denied that any promises had been made to induce his plea and that he was not subjected to any threats, pressure, or coercion. He also expressed his understanding that life imprisonment was the only sentence which could be imposed by the court. The statements which McLeod now attributes to his lawyer do not constitute a basis for postconviction relief. At most,

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[11] See, *State v. Barnes, supra* note 10; *State v. Deckard*, 272 Neb. 410, 722 N.W.2d 55 (2006).

[12] See *State v. Thomas*, 262 Neb. 138, 629 N.W.2d 503 (2001).

[13] See, *State v. McHenry, supra* note 4; *State v. Dean, supra* note 4.

he has alleged that his lawyer advised him there was a chance of future clemency in the form of commutation, which was consistent with the court's statement at sentencing that McLeod would remain in prison for the rest of his natural life unless and until his sentence was commuted to a term of years by the Board of Pardons and that he would not be eligible for parole prior to any such commutation.

(b) Pending Motions

McLeod alleges that his counsel could not have made an adequate assessment of the proposed plea agreement without knowing the ultimate disposition of his pending motions to suppress a statement and to transfer his case to juvenile court. But he alleges no facts upon which to assess the merits of the motions, nor does he allege that the State's offer of a plea agreement would have remained open if counsel had insisted upon disposition of the motions before responding. The record clearly reflects McLeod's understanding that his right to obtain a disposition of the pending motions would be waived if the court accepted his plea and that he affirmatively chose to accept the plea agreement with that knowledge.

(c) Factual Basis for Plea

McLeod alleged that his counsel was ineffective in advising him to enter a plea to a charge for which there was no factual basis and in "failing to file a motion in arrest of judgment challenging the plea" as lacking a factual basis. At the sentencing hearing, the parties stipulated to the submission of a six-page narrative of the crime, which describes McLeod's involvement in the crime, as the factual basis for his plea. In response to questions from the court, McLeod indicated that he had read the document, that he did not wish to comment on its content, and that he still wished to enter a plea of no contest. The document disclosed that McLeod and two other individuals attempted to invade a residence in order to steal drugs. McLeod was armed with a .410 shotgun, and one of his accomplices was armed with a 12 gauge shotgun. McLeod admitted firing his .410 shotgun at the individual that was killed. A firearms examiner, however, noted that the pellets actually removed from the victim likely

came from the 12 gauge shotgun. Based on this, McLeod asserts that the factual basis showed he was guilty of aiding and abetting at best, but not guilty of first degree murder.

[7] McLeod alleged that this document established that he was merely an aider and abettor, and therefore could not have been found guilty of first degree murder. This claim lacks merit because the common-law distinction between principal and aider and abettor has been abolished in Nebraska; a person who aids, abets, procures, or causes another to commit any offense may be prosecuted as if he or she were the principal offender.[14] The record reflects a factual basis for McLeod's plea, and his counsel could not be ineffective for failing to contend otherwise.

(d) Speedy Trial

McLeod alleged that his counsel was ineffective in failing to preserve his constitutional right to a speedy trial guaranteed by the Sixth Amendment to the U.S. Constitution. In support of this claim, he alleged that his plea occurred 11 months after his arrest and that although his counsel filed certain motions "which would have tolled this time for the prosecution," such motions "did little for [McLeod] and much for the prosecution." He alleged no facts to support this conclusion.

[8] Determining whether a defendant's constitutional right to a speedy trial has been violated requires a balancing test in which the courts must approach each case on an ad hoc basis. This balancing test involves four factors: (1) length of delay, (2) the reason for the delay, (3) the defendant's assertion of the right, and (4) prejudice to the defendant.[15] None of these four factors standing alone is a necessary or sufficient condition to the finding of a deprivation of the right to speedy trial. Rather, the factors are related and must be considered together with other circumstances as may be relevant.[16] McLeod has not alleged facts to establish that he had a colorable claim of

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[14] *State v. Contreras*, 268 Neb. 797, 688 N.W.2d 580 (2004); Neb. Rev. Stat. § 28-206 (Reissue 1995).

[15] *State v. Sims*, 272 Neb. 811, 725 N.W.2d 175 (2006).

[16] *Id.*

denial of his constitutional right to a speedy trial at the time he entered his plea. Defense counsel is not ineffective for failing to raise an argument that has no merit.[17] Moreover, the record clearly reflects that McLeod knowingly and voluntarily waived his right to trial when he entered his plea.

(e) Appeal

In his postconviction motion, McLeod alleged that his counsel was ineffective in "filing a frivolous appeal for excessive sentence, knowing that the only sentence that the court could impose for the charge of Murder in the First Degree was a life sentence." He alleged that counsel should have raised "the speedy trial issue" and "lack of [a] factual basis for the charge of Murder in the First Degree" in his appeal.

McLeod alleged no facts concerning his directions to or communications with his attorney regarding an appeal. McLeod's direct appeal was clearly without merit, but whether it was frivolous may depend upon whether McLeod directed his counsel to file it.[18] But even where defense counsel completely fails to file an appeal, the question of whether a defendant is prejudiced thereby often depends upon "evidence that there were nonfrivolous grounds for appeal or that the defendant in question promptly expressed a desire to appeal."[19] Here, there is no allegation that McLeod specifically requested or directed his attorney to appeal his conviction or sentence. For the reasons discussed above, McLeod's claims regarding speedy trial and lack of factual basis would not have constituted "nonfrivolous grounds for appeal." McLeod has not alleged facts to establish ineffective assistance of appellate counsel, and his conclusory allegations are refuted by the record.

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[17] *State v. McHenry, supra* note 4.

[18] See *State v. Trotter*, 259 Neb. 212, 609 N.W.2d 33 (2000).

[19] *Roe v. Flores-Ortega*, 528 U.S. 470, 485, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000) (cited and quoted in *State v. Wagner*, 271 Neb. 253, 710 N.W.2d 627 (2006)).

(f) Summary

Based upon our examination of the postconviction motion and the files and records of the underlying criminal proceeding, we conclude that the district court did not err in denying postconviction relief without conducting an evidentiary hearing.

3. Denial of Motion to Appoint Counsel

[9,10] McLeod asserts that the district court erred in failing to appoint him counsel so that he could conduct further discovery on his postconviction motion. Under the Nebraska Postconviction Act, it is within the discretion of the trial court as to whether counsel shall be appointed to represent the defendant.[20] When the assigned errors in a postconviction petition before the district court contain no justiciable issues of law or fact, it is not an abuse of discretion to fail to appoint counsel for an indigent defendant.[21] Based upon our conclusion that McLeod's postconviction motion and the files and records of his case do not present any justiciable issue with respect to postconviction relief, we conclude that the district court did not abuse its discretion in denying his motion for appointment of counsel.

V. CONCLUSION

For the reasons discussed, we affirm the judgment of the district court.

Affirmed.

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[20] *State v. Bao*, 269 Neb. 127, 690 N.W.2d 618 (2005).

[21] *Id.*

DONNA EGGLESTON, SPECIAL ADMINISTRATOR OF THE LYDIA M. MULLIS ESTATE, APPELLANT AND CROSS-APPELLEE, V. ARDEITH L. KOVACICH, APPELLEE AND CROSS-APPELLANT.

742 N.W.2d 471

Filed December 7, 2007. No. S-06-684.

1. **Actions: Trusts: Equity.** An action to impose a constructive trust sounds in equity.
2. **Equity: Appeal and Error.** In an appeal of an equitable action, an appellate court tries factual questions de novo on the record, provided that where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
3. **Trusts: Property: Title: Unjust Enrichment: Equity.** A constructive trust is a relationship, with respect to property, subjecting the person who holds title to the property to an equitable duty to convey it to another on the ground that his or her acquisition or retention of the property would constitute unjust enrichment.
4. **Trusts: Property.** Intangible property and liquid assets such as stocks and bank and investment accounts may be held subject to a constructive trust.
5. **Trusts: Property: Title: Equity.** Regardless of the nature of the property upon which the constructive trust is imposed, a party seeking to establish the trust must prove by clear and convincing evidence that the individual holding the property obtained title to it by fraud, misrepresentation, or an abuse of an influential or confidential relationship and that under the circumstances, such individual should not, according to the rules of equity and good conscience, hold and enjoy the property so obtained.
6. **Trusts: Statutes: Banks and Banking: Intent.** Neb. Rev. Stat. § 30-2719 (Reissue 1995) provides that extrinsic evidence of the depositor's intent as to what type of account was created is relevant only when the contract of deposit is not in substantially the form provided in § 30-2719(a). When the contract of deposit for an account is substantially in such form, the account will be treated as being the type of account designated on the form; if the contract of deposit is not in such form, then the depositor's intent is relevant to determine the type of account pursuant to § 30-2719(b).
7. **Fraud.** Constructive fraud generally arises from a breach of duty arising out of a fiduciary or confidential relationship.
8. **Fraud: Words and Phrases.** Constructive fraud is a breach of a legal or equitable duty which, irrespective of the moral guilt of the fraud-feasor, the law declares fraudulent because of its tendency to deceive others, to violate public or private confidence, or to injure public interests.
9. **Fraud: Intent.** Constructive fraud is implied by law from the nature of the transaction itself. The existence or nonexistence of an actual purpose to defraud does not enter as an essential factor in determining the question; the law regards the transaction as fraudulent per se.

10. ____: ____. Neither actual dishonesty of purpose nor intent to deceive is an essential element of constructive fraud.
11. **Actions: Fraud: Proof.** In an action in which relief is sought on account of alleged fraud, the existence of a confidential or fiduciary relationship, or status of unequal footing, when shown, does not shift the position of the burden of proving all elements of the fraud alleged, but nevertheless may be sufficient to allow fraud to be found to have existed when in the absence of such a status it could not be so found, and thus to have the effect of placing the burden of going forward with the evidence upon the party charged with fraud.
12. **Principal and Agent: Joint Tenancy: Fraud: Proof. Intent.** In situations involving an attorney in fact, a prima facie case of constructive fraud is established if the plaintiff shows that the defendant held the principal's power of attorney and that the defendant, using the power of attorney, made a gift to himself or herself. A fiduciary's acquisition of a right of survivorship in property, even absent a present possessory interest, is generally sufficient to establish that a fiduciary has profited from a transaction. The burden of going forward under such circumstances falls upon the defendant to establish by clear and convincing evidence that the transaction was made pursuant to power expressly granted in the power of attorney document and made pursuant to the clear intent of the donor. The fiduciary bears the burden of proving the fairness of the transaction.

Appeal from the District Court for Otoe County: RANDALL L. REHMEIER, Judge. Affirmed.

Phillip G. Wright and Casey E. Miller, of Wright & Associates, for appellant.

Jeanette Stull, of Perry, Guthery, Haase & Gessford, P.C., L.L.O., for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MILLER-LERMAN, J.

I. NATURE OF CASE

Donna Eggleston, as special administrator of the estate of Lydia M. Mullis, appeals the order of the district court for Otoe County imposing a constructive trust on one bank account referred to as "account 547-745" but not on any other account owned by Mullis at her death. Eggleston asserts that the court erred in failing to impose a constructive trust on all of Mullis' assets. Ardeith L. Kovacich cross-appeals and asserts that the court erred in imposing a constructive trust on

account 547-745. For reasons that differ from those of the district court, we affirm.

II. STATEMENT OF FACTS

Mullis died in September 2000. She was survived by two daughters, Kovacich and Eggleston.

In 1999, Mullis met with an attorney to discuss estate planning. As a result of such planning, Mullis established a revocable trust into which she transferred a farm she owned near Cook, Nebraska. She also executed a will which provided that all assets she owned at death would become property of the trust. The terms of the trust provided that after Mullis' death, the trust would be divided equally between Kovacich and Eggleston. The trust document named Kovacich as the first successor trustee and Eggleston as the second successor trustee. Mullis' will named Kovacich as the personal representative and Eggleston as the alternate personal representative in the event Kovacich was unable or unwilling to serve. At the time Mullis executed the trust documents and the will, she also executed a durable power of attorney naming Kovacich as her attorney in fact.

Shortly after the documents noted above were signed, Mullis and Kovacich went to the Syracuse, Nebraska, branch of the First National Bank of Unadilla, now known as Countryside Bank (hereinafter the Bank), to open an account. The account was numbered 351-213 by the Bank. The signature card, sometimes referred to as the "contract of deposit," for account 351-213 named Mullis and Kovacich as owners of the account. The signature card included a section titled "Ownership of Account" which designated the account as a "Multiple-Party Account" and a section titled "Rights at Death" which designated the account as a "Multiple-Party Account With Right of Survivorship." A section of the signature card titled "Agency (Power of Attorney) Designation" was left blank. The signature card was signed by both Mullis and Kovacich.

On August 24, 2000, another account, numbered 547-745, was opened at the Bank. The signature card for account 547-745 named Mullis and Kovacich as owners of the account. The signature card for account 547-745 included a section

titled "Ownership of Account" which designated the account as a "Multiple-Party Account" and was initialed by Kovacich but not by Mullis. In the section titled "Rights at Death," the account was designated as a "Multiple-Party Account With Right of Survivorship" and was initialed by Kovacich but not by Mullis. A section of the signature card titled "Agency (Power of Attorney) Designation" was left blank. The signature portion of the card for account 547-745 was not signed by Mullis. Instead, beneath Mullis' typed name, Kovacich signed her own name followed by the designation "POA" which the parties and the district court have assumed without contradiction stands for "power of attorney."

Mullis died a few weeks after account 547-745 was opened. The inheritance tax worksheet prepared for her estate reported various accounts and bonds jointly owned by Mullis and Kovacich which totaled $148,650.72. Among the accounts were 351-213, which had a value of $13,889.66 at the date of Mullis' death, and 547-745, which had a value of $42,954.96 at the date of Mullis' death. The worksheet also showed that at her death, Mullis owned a farm valued at $60,000 and personal property valued at $3,000. The worksheet showed that the jointly owned accounts and bonds were to be distributed to Kovacich and that the farm and personal property were to be distributed evenly between Kovacich and Eggleston.

On October 1, 2003, Eggleston filed a complaint against Kovacich in district court. Eggleston had been appointed by the county court of Otoe County to act as special administrator of the estate. Eggleston alleged two causes of action. The first was for conversion. Eggleston alleged that Kovacich had used her position as Mullis' attorney in fact to convert to her own use various assets, including accounts 351-213 and 547-745 and the bonds that were used as the initial deposit for account 547-745. Eggleston alleged that the bonds had been held in the names of Mullis and Eggleston. As her second cause of action for imposition of a constructive trust, Eggleston alleged that the accounts and bond proceeds were placed in Kovacich's name under a constructive trust to be used for the benefit of Mullis during her lifetime and that at Mullis' death, such funds were to be divided equally between Kovacich and Eggleston according to the terms

of the trust. Eggleston sought an accounting of such funds and an order directing Kovacich to turn the funds over to the estate for proper distribution.

Following trial, the district court entered an order dated December 5, 2005. The court concluded that with respect to all accounts and bonds other than accounts 351-213 and 547-745, there was no evidence to suggest that Mullis intended anything other than that the accounts and bonds were to belong to Kovacich upon Mullis' death.

With respect to account 351-213, the court determined that the evidence, including testimony of the Bank employee who assisted in opening the account, indicated that the decision to designate this account as a joint account with Kovacich was Mullis' decision without undue influence by Kovacich. The court concluded that the evidence failed to show conversion on the part of Kovacich. The court also concluded that the evidence did not support a finding that account 351-213 was set up as an account "for the convenience of" Mullis.

With respect to account 547-745, the court found the evidence to be "more troublesome." The court in its order found the following: In the summer of 2000, Mullis was taken to live with Kovacich in Rock Springs, Wyoming, due to Mullis' declining health and her need for help in dealing with her affairs. In August 2000, Mullis returned to Nebraska to move into a nursing home in Syracuse. Mullis was concerned with the costs of the nursing home and decided to open a new account to take care of nursing home expenses and related finances. On August 24, the same day Mullis moved into the nursing home, account 547-745 was opened. The signature card for account 547-745 was not signed by Mullis but was signed by Kovacich pursuant to the power of attorney. The funds in the account came from two sources—U.S. bonds and a Commercial Federal Bank account. The Commercial Federal Bank account was jointly owned by Mullis and Kovacich and amounted to $25,248.08. The U.S. bonds that were liquidated to fund account 547-745 were held in the names of Mullis and Eggleston. There were also U.S. bonds held in the names of Mullis and Kovacich, but such bonds were not liquidated to fund account 547-745. Kovacich testified at trial that account

547-745 was set up the way it was "[b]ecause that's the procedure as far as being on an account with somebody in case they [sic] become disabled or something that you can take care of their [sic] financial things."

The court concluded in its order that when account 547-745 was set up, it was not Mullis' intention that Kovacich be entitled to all of the funds in the account at her death. The court in its order noted Kovacich's argument based on statute to the effect that Mullis' intention was not relevant because the account was set up as a multiple-party account with right of survivorship. Kovacich argued that under current Nebraska statutes, such an account belongs to the surviving party and that the intention of the party who created the account is not relevant. Kovacich noted that current Neb. Rev. Stat. § 30-2723(a) (Reissue 1995) provides that "on death of a party sums in deposit in a multiple-party account belong to the surviving party or parties." Kovacich contrasted the current statute to former Neb. Rev. Stat. § 30-2704(a) (Reissue 1989) which provided that sums in a joint account belonged to the surviving party or parties "unless there is clear and convincing evidence of a different intention at the time the account is created." Kovacich argued at trial and on appeal that because the current statute omits the language regarding the decedent's intention, the Legislature intended to eliminate consideration of the intention of the person creating the account. The court rejected Kovacich's arguments and concluded that under the current statutes, a court would be justified in receiving extrinsic evidence if it found that the account was opened solely for the convenience of the party who supplied the funds and was not intended as a gift or death benefit for the other party. The court concluded that account 547-745 was set up as a "convenience account" to take care of Mullis' financial needs while she was in the nursing home and was not intended as a gift or death benefit to Kovacich.

In view of its conclusions, the district court imposed a constructive trust on account 547-745 requiring Kovacich to hold Eggleston's interest in the account as trustee for the benefit of Eggleston as beneficiary and to account for all profits Kovacich received from the account. The court entered judgment in favor of Kovacich with regard to all accounts and bonds other than

account 547-745, and dismissed Eggleston's complaint with regard to such other accounts and bonds. The court reserved the issue of an accounting with regard to account 547-745.

A hearing on the accounting was held May 8, 2006. In an order entered May 26, the court noted Kovacich's argument that the funds held in the account should be prorated based on the sources of funds used to establish the account. The two sources were U.S. bonds owned by Mullis and Eggleston in the amount of $17,637.44 and a Commercial Federal Bank account owned by Mullis and Kovacich in the amount of $25,248.08. The court rejected Kovacich's argument and determined that Mullis' intention was to establish a new account and that the sources lost their identities when they were liquidated and put into the new account. The court determined that because account 547-745 was a "convenience account," the account should have been an asset of Mullis' estate. The court determined that the balance of account 547-745 at the date of Mullis' death was $42,954.96, and the court calculated interest of $9,770.70 from the date of death until the date of the order. The court therefore entered judgment against Kovacich and ordered her to pay $52,725.66 to Eggleston, as special administrator of the estate, for distribution from the estate.

Eggleston appeals, and Kovacich cross-appeals.

III. ASSIGNMENTS OF ERROR

In her appeal, Eggleston asserts that the district court erred in failing to impose a constructive trust on all of Mullis' assets, including account 351-213 and the other accounts and bonds. In her cross-appeal, Kovacich asserts that the court erred in imposing a constructive trust on account 547-745.

IV. STANDARDS OF REVIEW

[1,2] An action to impose a constructive trust sounds in equity. *Anderson v. Bellino*, 265 Neb. 577, 658 N.W.2d 645 (2003). In an appeal of an equitable action, an appellate court tries factual questions de novo on the record, provided that where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one

version of the facts rather than another. *Ferer v. Aaron Ferer & Sons Co.*, 273 Neb. 701, 732 N.W.2d 667 (2007).

V. ANALYSIS

The district court imposed a constructive trust on account 547-745, but did not impose a constructive trust on account 351-213 or any of the other accounts or bonds. In her appeal, Eggleston asserts that the court erred in failing to impose a constructive trust on all of the accounts and bonds, including account 351-213; in her cross-appeal, Kovacich asserts that the court erred in imposing the constructive trust on account 547-745. For the reasons discussed below, which differ in some respects from those of the district court, we conclude that because Eggleston established constructive fraud by virtue of Kovacich's use of her power of attorney to designate account 547-745 as a multiple-party account with right of survivorship, the court did not err in imposing a constructive trust on account 547-745. We further conclude that the district court did not err in declining to impose a constructive trust on account 351-213 and the other assets. In reaching these conclusions, we first analyze the cross-appeal and thereafter consider the appeal.

1. Standards for Imposing Constructive Trusts

[3-5] In view of the contentions of the parties, we review the standards applicable to constructive trusts. A constructive trust is a relationship, with respect to property, subjecting the person who holds title to the property to an equitable duty to convey it to another on the ground that his or her acquisition or retention of the property would constitute unjust enrichment. *Trieweiler v. Sears*, 268 Neb. 952, 689 N.W.2d 807 (2004). Intangible property and liquid assets such as stocks and bank and investment accounts may be held subject to a constructive trust. *Id.* Regardless of the nature of the property upon which the constructive trust is imposed, a party seeking to establish the trust must prove by clear and convincing evidence that the individual holding the property obtained title to it by fraud, misrepresentation, or an abuse of an influential or confidential relationship and that under the circumstances, such individual should not, according to the rules of equity and good conscience, hold and enjoy the property so obtained. *Id.*

Applying these standards in the present case, we determine that if Eggleston established that Kovacich obtained title to the accounts at issue by some form of actual or constructive fraud, misrepresentation, or abuse of an influential or confidential relationship such as her position as Mullis' attorney in fact, then a constructive trust would be an appropriate form of equitable relief with respect to the accounts at issue.

2. Cross-Appeal: District Court Did Not Err in Imposing a Constructive Trust on Account 547-745

(a) Cross-Appeal: District Court Erred in Concluding That Account 547-745 Was a Convenience Account and not a Multiple-Party Account With Right of Survivorship and Erred in Considering Extrinsic Evidence to Determine the Nature of the Account

At issue in this appeal is the proper characterization and treatment of accounts under article 27 of the Nebraska Probate Code contained in chapter 30 of the Nebraska Revised Statutes. In this connection, we examine under what circumstances a court may look to extrinsic evidence to determine the nature of an account. In the present case, we conclude that because the contract of deposit for account 547-745 contained provisions substantially in the form provided in Neb. Rev. Stat. § 30-2719(a) (Reissue 1995), the court should have determined from the face of the contract of deposit that account 547-745 was a multiple-party account with right of survivorship. The district court should not have looked to extrinsic evidence to determine the nature of the account and erred in concluding that account 547-745 was a "convenience account."

Under § 30-2719(a), a "contract of deposit that contains provisions in substantially the form provided in this subsection establishes the type of account provided, and the account is governed by the provisions of sections 30-2716 to 30-2733 applicable to an account of that type." Section 30-2719(a) contains a sample account form providing for designation of various features including ownership ("Single-Party Account" or "Multiple-Party Account"); rights at death (including, inter alia, "Right of Survivorship," "POD (Pay on Death) Designation," or single-party account passing at death as part of party's

estate); and "Agency (Power of Attorney) Designation" (allowing a party to designate an agent to make account transactions for the party but not have ownership or rights at death unless otherwise designated). Section 30-2719(b) provides that a "contract of deposit that does not contain provisions in substantially the form provided in subsection (a) of this section is governed by the provisions of sections 30-2716 to 30-2733 applicable to the type of account that most nearly conforms to the depositor's intent."

[6] We read § 30-2719 as providing that extrinsic evidence of the depositor's intent as to what type of account was created is relevant only when the contract of deposit is not in substantially the form provided in § 30-2719(a). When the contract of deposit for an account is substantially in such form, the account will be treated as being the type of account designated on the form; if the contract of deposit is not in such form, then the depositor's intent is relevant to determine the type of account pursuant to § 30-2719(b).

As noted by Kovacich, prior to the 1993 revisions of the Nebraska Probate Code, § 30-2704(a) provided that "[s]ums remaining on deposit at the death of the party to a joint account belong to the surviving party or parties as against the estate of the decedent *unless there is clear and convincing evidence of a different intention at the time the account is created*." (Emphasis supplied.) Kovacich notes that the current statute omits the exception regarding a different intention. Further, current § 30-2723 merely states that "on death of a party sums on deposit in a multiple-party account belong to the surviving party or parties."

Under the prior statute, a court could examine extrinsic evidence to determine whether "the intention at creation of [a joint] account was other than the intention that all funds belong to the surviving party or parties to the account." *In re Estate of Lienemann*, 222 Neb. 169, 175, 382 N.W.2d 595, 600 (1986). Thus, under the former statute, a court could, as the court did in this case, determine that a joint account, known under the current statutes as a "multiple-party account," was opened solely as a convenience to allow the secondary owner to make transactions on behalf of the principal owner without there having

been an intention to give the secondary owner rights to the account at the principal owner's death.

The current statutes provide a mechanism for creation of an account wherein an agent may be permitted to write checks, but the agent would not stand to inherit the funds in the account, except by virtue of another vehicle for inheritance other than the form of the account. Under the current statutes, and consistent with the form contained in § 30-2719(a), an account may be set up as a single-party account with an agency designation. This structure for an agency account allows the agent to make account transactions without having an ownership interest or rights at death. See § 30-2719 and Neb. Rev. Stat. § 30-2720 (Reissue 1995). Under the current statutes, account holders have the opportunity to set up an account with an agency designation in order to have the desired features of a "convenience account." The purpose of the form provided under § 30-2719(a) appears to be to make clear account holders' intentions regarding issues of ownership, rights at death, and agency designation and, therefore, to make unnecessary an examination of extrinsic evidence to determine such intentions.

We note further that article 27 of the Nebraska Probate Code is based on the Uniform Probate Code's revised article VI. The comment to Uniform Probate Code § 6-212 (the counterpart of § 30-2723) states that the purpose of the drafters was

> to permit a court to implement the intentions of parties to a joint account governed by Section 6-204(b) [the counterpart of § 30-2719(b)] if it finds that the account was opened solely for the convenience of a party who supplied all funds reflected by the account and intended no present gift or death benefit for the other party.

Unif. Probate Code § 6-212, comment, 8 U.L.A. 441 (1998). We believe this comment is consistent with our reading above that intention is relevant only when the contract of deposit does not substantially follow the form set forth in § 30-2719(a) and is therefore governed by § 30-2719(b), the latter of which permits an assessment of "the type of account that most nearly conforms to the depositor's intent." When the contract of deposit is not in the form outlined in § 30-2719(a), a court may look to extrinsic evidence to determine whether the intention

of the depositor was to set up an account formerly commonly referred to as a "convenience account" but perhaps more aptly now referred to as an "agency account." See §§ 30-2719 and 30-2720. See, also, Introducer's Statement of Intent, L.B. 250, Judiciary Committee, 93d Leg., 1st Sess. (Mar. 10, 1993). However, if the contract of deposit is in the form provided in § 30-2719(a), then a court looks only to the contract of deposit and treats the account as the type of account designated in the contract of deposit.

The contract of deposit for account 547-745 in the present case was substantially in the form provided in § 30-2719(a). The signature card contained provisions regarding ownership, rights at death, and agency designation. Because the signature card in account 547-745 was in such form, under § 30-2719(a), the account was the type indicated on the card and the district court should not have looked to extrinsic evidence of intent to determine the type of account. The signature card indicated that account 547-745 was a multiple-party account with a right of survivorship. Sections of the card which could have been used to designate the account as an agency account were left blank.

We conclude that the district court erred in this case when it looked to extrinsic evidence to determine the nature of account 547-745. The district court further erred when it concluded, contrary to the designation in the signature card, that account 547-745 was a "convenience account" that at death would pass as part of Mullis' estate, rather that a multiple-party account with right of survivorship. To the extent that the district court rested its decision to impose a constructive trust based on its erroneous determination that account 547-745 was a "convenience account," such reasoning was in error. The district court erred when it failed to conclude that account 547-745 was a multiple-party account with right of survivorship.

(b) Cross-Appeal: District Court Did Not Err in Imposing Constructive Trust on Account 547-745 Because Eggleston Established Constructive Fraud by Kovacich

Although the court erred in reasoning that a constructive trust should be imposed on account 547-745 because it was a

"convenience account," we nevertheless conclude that it was proper to impose a constructive trust because Eggleston established constructive fraud with respect to account 547-745. As noted above, a constructive trust may be imposed when it is found that property was obtained "by fraud, misrepresentation, or an abuse of an influential or confidential relationship." *Trieweiler v. Sears*, 268 Neb. 952, 978, 689 N.W.2d 807, 834 (2004).

[7-10] In prior cases, we have noted that fraud may include constructive fraud and that abuse of an influential or confidential relationship may include using a power of attorney to make a gift to oneself. Constructive fraud generally arises from a breach of duty arising out of a fiduciary or confidential relationship. *Crosby v. Luehrs*, 266 Neb. 827, 669 N.W.2d 635 (2003). Constructive fraud is a breach of a legal or equitable duty which, irrespective of the moral guilt of the fraud-feasor, the law declares fraudulent because of its tendency to deceive others, to violate public or private confidence, or to injure public interests. *Id.* Constructive fraud is implied by law from the nature of the transaction itself. The existence or nonexistence of an actual purpose to defraud does not enter as an essential factor in determining the question; the law regards the transaction as fraudulent per se. *Id.* Neither actual dishonesty of purpose nor intent to deceive is an essential element of constructive fraud. *Id.*

[11,12] In an action in which relief is sought on account of alleged fraud, the existence of a confidential or fiduciary relationship, or status of unequal footing, when shown, does not shift the position of the burden of proving all elements of the fraud alleged, but nevertheless may be sufficient to allow fraud to be found to have existed when in the absence of such a status it could not be so found, and thus to have the effect of placing the burden of going forward with the evidence upon the party charged with fraud. *Crosby v. Luehrs, supra*. In situations involving an attorney in fact, we have determined that a prima facie case of constructive fraud is established if the plaintiff shows that the defendant held the principal's power of attorney and that the defendant, using the power of attorney, made a gift to himself or herself. *Id.* A fiduciary's acquisition of a right of survivorship in property, even absent a present possessory

interest, is generally sufficient to establish that a fiduciary has profited from a transaction. *Id*. The burden of going forward under such circumstances falls upon the defendant to establish by clear and convincing evidence that the transaction was made pursuant to power expressly granted in the power of attorney document and made pursuant to the clear intent of the donor. The fiduciary bears the burden of proving the fairness of the transaction. *Id*.

In the present case, Eggleston established that Kovacich held Mullis' power of attorney and that Kovacich, using the power of attorney, made a gift to herself via account 547-745. As in *Crosby v. Luehrs, supra*, Kovacich's acquisition of a right of survivorship in account 547-745 was sufficient to establish that she profited by opening account 547-745 using the power of attorney. Eggleston therefore established a prima facie case of constructive fraud.

After Eggleston established a prima facie case, the burden fell upon Kovacich to establish by clear and convincing evidence that the designation of account 547-745 as a multiple-party account with right of survivorship was (1) made pursuant to power expressly granted in the power of attorney document and (2) made pursuant to the clear intent of Mullis. With respect to the first requirement, the power of attorney document executed by Mullis named Kovacich as attorney in fact and stated that the attorney in fact had power to, inter alia, "make gifts to any person, including my attorney, if my attorney deems such gifts wise for tax and/or estate planning purposes, provided, however, that my attorney shall not make gifts to my attorney's creditors, my attorney's estate, or the creditor's [sic] of my attorney's estate." Although it is arguable that Kovacich established that she was authorized to make gifts to herself, we need not resolve this issue because Kovacich failed to establish that the gift of a right of survivorship in account 547-745 was made pursuant to the clear intent of Mullis. To the contrary, at trial, Kovacich testified that account 547-745 was established "[b]ecause that's the procedure as far as being on an account with somebody in case they [sic] become disabled or something that you can take care of their [sic] financial things." Thus, the evidence, including Kovacich's own testimony, indicated that Mullis intended the account to be

an agency account in which Kovacich had the power to make transactions but did not have an ownership interest.

Although extrinsic evidence of Mullis' intention regarding account 547-745 was not relevant to the question considered above regarding the type of account, the evidence is relevant to determining the existence of constructive fraud. In determining above that account 547-745 was a multiple-party account with right of survivorship, extrinsic evidence of intention was not relevant because the contract of deposit was in substantially the form provided in § 30-2719(a). However, in connection with the issue of constructive fraud, the question is not the type of treatment to be accorded account 547-745; instead, the question is whether Kovacich, using her power of attorney, designated account 547-745 as the type of account Mullis intended it to be.

Eggleston established a prima facie case of constructive fraud, and Kovacich failed to establish that Mullis' clear intent was to create the account as a multiple-party account with right of survivorship. Imposing a constructive trust on account 547-745 was a proper remedy for such constructive fraud, and we therefore conclude that the district court did not err in imposing a constructive trust on account 547-745.

3. Appeal: District Court Did Not Err in Declining to Impose a Constructive Trust on Account 351-213 and Other Assets

In her appeal, Eggleston argues that the court erred in failing to impose a constructive trust on account 351-213 and the other accounts and bonds. We conclude that the district court did not err in determining that account 351-213 and the other accounts and bonds were designated with right of survivorship to Kovacich. We further conclude that the district court did not err in determining that the evidence did not establish that Kovacich used the power of attorney to open account 351-213 or any other accounts and that therefore, Eggleston has not established constructive fraud with respect to such accounts. We therefore conclude that the court did not err when it declined to impose a constructive trust on account 351-213 and the other accounts and bonds.

With respect to account 351-213, the contract of deposit was substantially in the form set forth in § 30-2719(a). The signature card indicated that the account was a multiple-party account owned by Mullis and Kovacich with right of survivorship. The signature card was signed by both Mullis and Kovacich. The section in which an agency designation could be made was left blank. On its face, account 351-213 was a multiple-party account with right of survivorship. See § 30-2719(a) and (b). With regard to the remaining accounts and bonds, the evidence indicates that the accounts and bonds were designated as giving a right of survivorship to Kovacich and that the related contracts of deposit were either substantially in the form set forth in § 30-2719(a) or, if such contracts of deposit were not in such form, that Eggleston failed to provide evidence pursuant to § 30-2719(b) that Mullis' intention was anything other than that Kovacich should have a right of survivorship. We therefore determine that account 351-213 and the other accounts and bonds provided a right of survivorship to Kovacich.

With respect to constructive fraud, we note that unlike the signature card for account 547-745 which Kovacich signed for Mullis using the power of attorney, the signature card for account 351-213 was signed by Mullis herself. Kovacich also signed as an owner, but she did not use the power of attorney to sign the card on Mullis' behalf. There is no indication that Kovacich opened any of the other accounts or bonds using the power of attorney. Because Kovacich did not use the power of attorney to open account 351-213 or the other accounts and bonds, Eggleston did not establish that Kovacich used her power of attorney to make a gift to herself with respect to such accounts. Eggleston therefore did not establish a prima facie case of constructive fraud with respect to such accounts. Furthermore, Eggleston did not establish constructive fraud in any other sense with respect to account 351-213 or the other accounts and bonds, nor did she establish conversion.

The evidence shows that Kovacich had a right of survivorship with respect to account 351-213 and the other accounts and bonds, and Eggleston did not establish constructive fraud with respect to account 351-213 and the other assets. We therefore conclude that the district court did not err when it declined to

impose a constructive trust on account 351-213 and the other accounts and bonds.

VI. CONCLUSION

Because Eggleston established constructive fraud with respect to account 547-745 but failed to establish constructive fraud with respect to account 351-213 and the other accounts and bonds, we conclude that the district court did not err in imposing a constructive trust on account 547-745 but not on account 351-213 and the other assets. Although our reasoning differs from that of the district court, we affirm the district court's order.

AFFIRMED.

COREY BRETT HEINZE, APPELLANT, V. TAYLOR HEINZE, APPELLEE.

742 N.W.2d 465

Filed December 7, 2007. No. S-06-722.

1. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusions reached by the trial court.
2. **Jurisdiction: States.** The first step in a conflict-of-law analysis is to determine whether there is an actual conflict between the legal rules of different states.
3. ____: ____. An actual conflict exists when a legal issue is resolved differently under the law of two states.
4. ____: ____. When there are no factual disputes regarding state contacts, conflict-of-law issues present questions of law.
5. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.

Appeal from the District Court for York County: ALAN G. GLESS, Judge. Affirmed.

Vincent M. Powers, of Vincent M. Powers & Associates, and Steven B. Fillman, of Fillman Law Offices, for appellant.

Timothy J. Thalken and Rex A. Rezac, of Fraser Stryker, P.C., L.L.O., for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

WRIGHT, J.

NATURE OF CASE

While riding in an automobile driven by his wife, Corey Brett Heinze was injured in an accident in Colorado. Corey and his wife, Taylor Heinze, were residents of York, Nebraska, and Corey sued Taylor in the York County District Court for damages as a result of the accident. The court concluded that Nebraska's guest statute barred Corey's action and granted summary judgment in favor of Taylor. Corey timely appealed. The issue is whether Nebraska or Colorado law applies to the accident above described.

SCOPE OF REVIEW

[1] When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusions reached by the trial court. *State ex rel. Wagner v. Amwest Surety Ins. Co., ante* p. 110, 738 N.W.2d 805 (2007).

FACTS

In December 2002, Corey and Taylor traveled to Colorado to visit Taylor's family. On December 22, Corey rode as a passenger when Taylor drove her mother's automobile to the Denver airport to pick up other family members. She hit loose gravel on the shoulder of an off ramp and lost control of the automobile, which rolled into a ditch. Corey was ejected, and he sustained injuries to his head, spine, spleen, and right wrist.

When Corey sued Taylor, he alleged that the laws of Colorado applied because the accident occurred in the State of Colorado. Taylor alleged that the action was barred by Nebraska's guest statute, Neb. Rev. Stat. § 25-21,237 (Reissue 1995), because Corey and Taylor were married at the time of the accident. They were divorced in December 2004.

The district court concluded that Nebraska law applied because Nebraska had a more significant relationship to the parties under the guest statute and was the jurisdiction in which the relationship between the parties was centered. Thus, the court determined that § 25-21,237 barred Corey's claim. The

district court found that there were no genuine issues of material fact and that Taylor was entitled to judgment as a matter of law. It dismissed the cause with prejudice and taxed the costs to Corey.

ASSIGNMENTS OF ERROR

Corey assigns the following errors: The district court erred (1) in applying the law of Nebraska to an accident that occurred in Colorado; (2) in ignoring Nebraska precedent and applying the Restatement (Second) of Conflict of Laws in determining that Colorado law did not apply to the facts of this case; (3) in applying the Restatement (Second) of Conflict of Laws § 169 (1971); (4) in determining that Nebraska, rather than Colorado, had more significant contacts with the occurrence and the parties; and (5) in entering summary judgment in favor of Taylor and dismissing Corey's complaint.

ANALYSIS

The issue for our determination is whether Nebraska's guest statute should be applied to an accident involving Nebraska residents that occurred in Colorado. The district court concluded that Nebraska law should be applied and that our guest statute barred Corey's recovery.

[2,3] The first step in a conflict-of-law analysis is to determine whether there is an actual conflict between the legal rules of different states. *Johnson v. United States Fidelity & Guar. Co.*, 269 Neb. 731, 696 N.W.2d 431 (2005). An actual conflict exists when a legal issue is resolved differently under the law of two states. *Id.* A conflict-of-law issue is presented in this case because Nebraska has a guest statute, § 25-21,237, and Colorado has repealed its guest statute, see *White v. Hansen*, 837 P.2d 1229 (Colo. 1992).

The Nebraska guest statute provides in relevant part:

> The owner or operator of a motor vehicle shall not be liable for any damages to any passenger or person related to such owner or operator as spouse or within the second degree of consanguinity or affinity who is riding in such motor vehicle as a guest or by invitation and not for hire, unless such damage is caused by (1) the driver of such

> motor vehicle being under the influence of intoxicating liquor or (2) the gross negligence of the owner or operator in the operation of such motor vehicle.

§ 25-21,237.

[4] When there are no factual disputes regarding state contacts, conflict-of-law issues present questions of law. *Johnson, supra.* When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusions reached by the trial court. *State ex rel. Wagner v. Amwest Surety Ins. Co., ante* p. 110, 738 N.W.2d 805 (2007). In this case, there are no factual disputes. The parties agree that Corey and Taylor were residents of Nebraska, that the accident occurred in Colorado, and that the automobile involved was owned by a Colorado resident and licensed in Colorado.

This court has not specifically determined whether Nebraska's guest statute should be applied when a motor vehicle accident has occurred in another state involving Nebraska residents who are within the degree of consanguinity set forth in § 25-21,237. We have, however, considered cases that raised a conflict-of-law question in other contexts and in which the guest statute was not implicated.

In *Crossley v. Pacific Employers Ins. Co.*, 198 Neb. 26, 251 N.W.2d 383 (1977), *disapproved on other grounds, Johnson, supra*, the passenger (a resident of Nebraska) brought an action in Nebraska for personal injuries that resulted from an automobile accident which occurred in Colorado in an automobile owned and driven by the passenger's stepson. The passenger argued that he should be entitled to recover from the Colorado driver as though the tort liability law of Nebraska applied to the accident in Colorado and that if he could not do so, then he should be allowed to recover under the uninsured motorist coverage of his own automobile insurance policy.

We cited the Restatement (Second) of Conflict of Laws § 146, comment *d.* (1971), and stated that "in virtually all instances where the conduct and the injury occur in the same state, that state has the dominant interest in regulating that conduct and in determining whether it is tortious in character, and whether the interest affected is entitled to legal protection." *Crossley*, 198 Neb. at 30, 251 N.W.2d at 386. The basis of the cause in

Crossley was an insurance contract rather than an action in tort. This court was asked to determine which state's laws would be applied to determine insurance coverage.

In another insurance case, the action again arose from a motor vehicle accident that occurred in Colorado involving a Nebraska resident. *Johnson v. United States Fidelity & Guar. Co.*, 269 Neb. 731, 696 N.W.2d 431 (2005). The injured driver sought additional benefits from his insurer and the insurer of the car he was driving. In addressing the conflict of law between Nebraska and Colorado relating to uninsured motorist benefits, we reaffirmed the holding in *Crossley* that under the Restatement, *supra*, § 146, Colorado's no-fault law governed the threshold issue of the tort-feasor's liability.

The significance of *Crossley* and *Johnson* as they are applied to the case at bar is that this court recognized the application of § 146 to resolve conflict of laws involving tort liability.

The Restatement provides:

> In an action for a personal injury, the local law of the state where the injury occurred determines the rights and liabilities of the parties, *unless, with respect to the particular issue, some other state has a more significant relationship* under the principles stated in § 6 to the occurrence and the parties, in which event the local law of the other state will be applied.

§ 146 at 430 (emphasis supplied).

Thus, under the Restatement, the law of the site of the injury is usually applied to determine liability, except where another state has a more significant relationship on a particular issue. The fact that Nebraska has a guest statute provides this state with a more significant relationship to the parties when they are residents of Nebraska.

This court applied the Restatement's more-significant-relationship test to a tort case in *Malena v. Marriott International*, 264 Neb. 759, 651 N.W.2d 850 (2002). A hotel patron from Nebraska was stuck by a needle in a California hotel room. An action was brought in Nebraska by the Nebraska resident. The defendant alleged the case was governed by the substantive law of California. The action centered around parasitic damages for fear of contracting a disease. The trial court determined that

any damage attributable to the fear of contracting a disease was controlled by Nebraska law.

We stated: "In choice-of-law determinations for personal injury claims, we have adopted Restatement (Second) of Conflict of Laws § 146 (1971)." *Malena*, 264 Neb. at 766, 651 N.W.2d at 856. We noted that § 146 is the starting point for any choice-of-law analysis and that under § 146, the presumption is that the local law of the state where the injury occurred determines the rights and liabilities of the parties *unless some other state has a more significant relationship to the parties and the occurrence with respect to a particular issue*. We concluded that in that case, California had the more significant relationship to the parties and the occurrence because the injury occurred there, the conduct causing the injury occurred there, the defendant's place of business was there, and the relationship between the parties was there. The only contact with Nebraska was the domicile of the hotel patron. Again, the guest statute was not implicated.

The Restatement (Second) of Conflict of Laws § 145 (1971) sets forth the "'most significant relationship'" test used for determining the applicable law for specific tort claim issues. See *Malena*, 264 Neb. at 767, 651 N.W.2d at 856.

Section 145 at 414 states:

> (1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.
>
> (2) Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:
>
> (a) the place where the injury occurred,
>
> (b) the place where the conduct causing the injury occurred,
>
> (c) the domicil[e], residence, nationality, place of incorporation and place of business of the parties, and
>
> (d) the place where the relationship, if any, between the parties is centered.

> These contacts are to be evaluated according to their relative importance with respect to the particular issue.

The Restatement notes that in cases involving a guest passenger, the local law of the common domicile may be applied:

> [T]he circumstances under which a guest passenger has a right of action against the driver of an automobile for injuries suffered as a result of the latter's negligence may be determined by the local law of their common domicil[e], if at least this is the state from which they departed on their trip and that to which they intended to return, rather than by the local law of the state where the injury occurred.

§ 145, comment *d*. at 418.

Following this approach, the record supports a conclusion that Nebraska law should apply in this case. Corey and Taylor were both residents of Nebraska at the time of the accident. Their trip to Colorado began in Nebraska and was intended to end in Nebraska. They lived and worked in Nebraska, and their relationship was centered in Nebraska at the time. The parties were married at the time of the accident. Thus, this state's law should govern whether Corey may recover for his injuries.

Although a guest statute is distinct from a statute providing immunity for family members, the Restatement (Second) of Conflict of Laws § 169 at 506 (1971) provides additional guidance: "(1) The law selected by application of the rule of § 145 determines whether one member of a family is immune from tort liability to another member of the family. (2) The applicable law will usually be the local law of the state of the parties' domicil[e]."

The Restatement provides a rationale for cases involving family members:

> *b. Rationale*. An immunity from tort liability is commonly possessed in varying circumstances by one spouse against the other spouse and by a parent against a minor child. Reasons frequently advanced to explain the existence of such immunity are the common law doctrine of the legal identity of the spouses, the desire to foster and preserve marital harmony and parental discipline, and the desire to protect insurance companies from false claims. Whatever

> the true explanation, the state of the parties' domicil[e] will almost always be the state of dominant interest, and, if so, its local law should be applied to determine whether there is immunity in the particular case.

§ 169, comment *b*. at 506-07.

Section 169 suggests that in cases involving family members, the state where the parties are domiciled has a more significant relationship to the action and will govern over the law of the state where the tort occurred. We agree.

The contacts identified in the Restatement (Second) of Conflict of Laws § 145 (1971) include the place where the injury occurred, the place where the conduct causing the injury occurred, the domicile or residence of the parties, and the place where the relationship, if any, between the parties is centered. Section 145 advises that the contacts are to be evaluated according to their relative importance. It does not suggest that each contact should be weighed evenly.

The district court found that Nebraska law applied because this state had a more significant relationship to the parties under the guest statute and Nebraska was the jurisdiction in which the relationship between the parties was centered. The court concluded that under § 25-21,237, Corey's claim was barred. By enacting the guest statute, the Legislature evidenced a concern about the possibility of fraud and collusion between related parties involved in tort actions. See *Le v. Lautrup*, 271 Neb. 931, 716 N.W.2d 713 (2006). The law of the state where that relationship is centered should govern the rights of the parties in this case.

At the time of the accident resulting in Corey's injuries, Corey and Taylor were married and living in York, Nebraska. Their common domicile was Nebraska at the time the lawsuit was filed. The trip to Colorado began in Nebraska and was intended to end in Nebraska. The relationship of the parties was centered in Nebraska, and this state has the most significant relationship to the parties. Nebraska's guest statute should apply.

[5] The district court sustained Taylor's motion for summary judgment. Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue as to any material fact or as to the ultimate inferences that may be

drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Papillion Rural Fire Prot. Dist. v. City of Bellevue, ante* p. 214, 739 N.W.2d 162 (2007). The lower court was correct in concluding that Corey's negligence claim against Taylor, his wife, was barred by the guest statute.

CONCLUSION

The judgment of the district court is affirmed.

AFFIRMED.

GERRARD, J., concurring.

I continue to believe that the Nebraska guest statute, Neb. Rev. Stat. § 25-21,237 (Reissue 1995), violates the equal protection clause of the Nebraska Constitution. See *Le v. Lautrup*, 271 Neb. 931, 716 N.W.2d 713 (2006) (Gerrard, J., dissenting). But there has not been a constitutional question raised in this case, and I agree with the majority's analysis of the questions presented. On that basis, I concur in the opinion of the court.

MCCORMACK, J., joins in this concurrence.

SHEILA K. BELLER, APPELLANT, V.
DEBBIE CROW ET AL., APPELLEES.
742 N.W.2d 230

Filed December 7, 2007. No. S-06-872.

1. **Attorneys at Law: Appeal and Error.** In an appeal from an order disqualifying counsel, an appellate court reviews the trial court's factual findings for clear error and ultimately makes its disqualification decision independent of the trial court's ruling.
2. **Attorneys at Law: Witnesses.** When a party seeks to disqualify an opposing attorney by calling that attorney as a witness, the court must strike a balance between the potential for abuse and those instances where the attorney's testimony may be truly necessary to the opposing party's case.
3. **Attorneys at Law: Testimony: Proof.** The party moving to disqualify an opposing attorney bears the burden of establishing that the attorney's testimony will be necessary.
4. **Trial: Attorneys at Law: Witnesses: Judgments.** A court cannot order disqualification simply upon the moving party's representation that the lawyer it seeks to disqualify is a necessary witness; the key is the evidence showing that the lawyer is a necessary witness.

5. **Trial: Attorneys at Law: Witnesses: Evidence.** A party seeking to call opposing counsel can prove that counsel is a necessary witness by showing that (1) the proposed testimony is material and relevant to the determination of the issues being litigated and (2) the evidence is unobtainable elsewhere.
6. **Trial: Attorney and Client: Witnesses.** That one or both parties could reasonably foresee that a lawyer would probably be a witness is relevant when determining whether the lawyer's disqualification would work substantial hardship on the client.

Appeal from the District Court for Douglas County: JOHN D. HARTIGAN, JR., Judge. Affirmed.

Gary D. McGuane for appellant.

Patrick M. Flood and Emily L. Jung, of Hotz, Weaver, Flood, Breitkreutz & Grant, for appellees Mount Michael Benedictine High School and Thomas Ridder.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

CONNOLLY, J.

Plaintiff Sheila K. Beller appealed the district court's disqualification of her counsel, Gary D. McGuane. Upon a motion filed by two of the defendants, the court disqualified McGuane because he had firsthand knowledge about the facts and issues of the lawsuit, making his testimony at trial "essentially inevitable."

The main issue is whether the district court correctly disqualified McGuane, because of his personal relationship with Beller and his firsthand knowledge of the relevant issues. Specifically, we must determine whether McGuane is likely to be a necessary witness at trial to justify his disqualification under Neb. Ct. R. of Prof. Cond. 3.7 (rev. 2005). Because McGuane is likely to be a necessary witness from his active participation in the events leading to the filing of Beller's complaint, we affirm.

BACKGROUND

Beller sued Debbie Crow, Alan Crow, Mount Michael Benedictine High School, Thomas Ridder, Cindi Backes, Steve Backes, and Theresa Gregg. Beller's complaint consisted of three counts: defamation, intentional infliction of emotional distress, and alienation of affection. Beller's complaint includes

allegations that the defendants falsely and maliciously stated that she was an abusive mother, that she neglected her minor children, and that she was mentally unfit to care for her minor children. She also claims that the defendants conspired to destroy her relationship with her children and to remove them from her custody, intentionally inflicting emotional distress on her. Beller alleges that the defendants induced one of her sons to run away from home, threatened to have her arrested, and sought to prevent her from speaking to her children. The court dismissed Beller's claims for alienation of affection, and those claims are not part of this appeal.

Beller's counsel, McGuane, is an Illinois attorney who was granted leave to appear pro hac vice. Three months after Beller filed her complaint, Mount Michael Benedictine High School and Thomas Ridder (collectively Mount Michael) moved to disqualify McGuane. In its motion, Mount Michael argued that McGuane "will likely be a necessary fact witness pursuant to Nebraska Rules of Professional Conduct Rule 3.7." Mount Michael asserted that McGuane was "privy to interactions [Beller] had with many of the co-Defendants" and that "McGuane is believed to possess factual information pertaining to [Beller's] alleged emotional distress and alleged damage to reputation." The court deferred the motion and granted Mount Michael leave to submit McGuane's deposition.

At his deposition, McGuane testified that he had been representing Beller for about 2½ years. He met Beller in an Internet "chat room," where she first asked him a question about her desire to go to college and maybe law school. He began giving her legal advice when she asked about divorces and annulments in the Catholic church. Although the record is not entirely clear, it appears McGuane and Beller developed a friendship and ultimately a close personal relationship. Attached to the deposition transcript is an exhibit that includes a Christmas card with affectionate comments that McGuane sent Beller in 2003.

Mount Michael asked McGuane whether he had witnessed any of the defamation or intentional infliction of emotional distress claims. In response, McGuane stated he witnessed an argument in February 2005 between Beller and defendant Gregg at Beller's home when Gregg tried to stop Beller from leaving

Omaha with her sons, who were present. McGuane explained that he "observed [Gregg] causing [Beller] emotional distress" and that the event "brought [Beller] almost to hysteria."

McGuane also described his involvement in the incident with Gregg. When Gregg refused to leave upon Beller's request, McGuane told Gregg to leave. When Gregg refused to move from behind Beller's car, McGuane let Beller take his car so she could leave the scene. When Gregg tried to follow Beller down the street, McGuane stood behind Gregg's car to prevent her from leaving the driveway.

McGuane also testified that he was present in April 2005 when defendant Ridder, Mount Michael Benedictine High School's principal, refused Beller permission to see her son at the high school. McGuane had accompanied Beller to the school so she could see her son. McGuane initially stayed in the car while Beller went into the building. At some point, he called the police to help Beller in gaining custody of her son, and he entered the school once the police arrived. McGuane agreed that the event with Ridder was relevant to Beller's intentional infliction of emotional distress and defamation claims.

McGuane was also present for several telephone calls between Beller and defendant Debbie Crow, but he was only able to hear Beller's end of the conversations. When asked whether these conversations formed any basis of Beller's complaint, McGuane stated that he assumed the telephone calls contributed to Beller's stress.

McGuane also acknowledged that he had a chance to observe Beller's emotional state before January 2005. He believes she has suffered emotional distress since then. He has seen her upset and depressed. According to McGuane, her sons and "everyone else near her" have observed Beller experience emotional distress. When asked whether he had caused Beller any emotional distress, McGuane responded, "I believe I have made it easier for her, actually."

After reviewing the deposition transcript, the court entered an order disqualifying McGuane as "mandated under Rule 3.7 of the Nebraska Rules of Professional Conduct." The court noted that Beller had no intent to call McGuane as a fact witness at trial. But the court also explained that "the Defendants

indicated that McGuane's knowledge of the events at issue in this case make his testimony at trial essentially inevitable, if only for credibility purposes." The court further provided that "[e]ven if . . . McGuane were not to testify at trial, it would not be feasible for the trier of fact to separate out his participation in the trial as an advocate, as opposed to a fact witness giving evidence in the course of his representation." Beller appealed McGuane's disqualification.

ASSIGNMENTS OF ERROR

Beller assigns, restated, that the court erred in disqualifying McGuane because (1) Mount Michael failed to offer evidence sufficient to establish that McGuane would be a necessary witness at trial and (2) the disqualification would work a substantial hardship on her.

STANDARD OF REVIEW

[1] In an appeal from an order disqualifying counsel, we review the trial court's factual findings for clear error and ultimately make our disqualification decision independent of the trial court's ruling.[1]

ANALYSIS

In 2005, the Nebraska Rules of Professional Conduct replaced the Nebraska Code of Professional Responsibility. The Code of Professional Responsibility remains effective for conduct occurring before September 1, 2005. Here, the relevant conduct—McGuane's testifying at trial—did not occur before September 1, 2005, and, therefore, the Rules of Professional Conduct apply.

Rule 3.7 provides in relevant part:

> (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:
>
> (1) the testimony relates to an uncontested issue;
>
> (2) the testimony relates to the nature and value of legal services rendered in the case; or
>
> (3) disqualification of the lawyer would work substantial hardship on the client.

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[1] *Mutual Group U.S. v. Higgins*, 259 Neb. 616, 611 N.W.2d 404 (2000).

Although we have applied a predecessor to rule 3.7 under the Code of Professional Responsibility,[2] this is our first case addressing rule 3.7.

The official comments to rule 3.7 describe the policies underlying the witness-advocate rule. Comment 1 explains that "[c]ombining the roles of advocate and witness can prejudice the tribunal and the opposing party and can also involve a conflict of interest between the lawyer and client." Comment 2 provides in part:

> The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.

[2] Additional considerations are involved when a party seeks to call an opposing attorney and thereby disqualify that attorney. There are times when a court must disqualify counsel because an adverse party intends to call counsel as a necessary witness. But we recognize that a party may move to disqualify opposing counsel for mere tactical or strategic reasons.[3] Clearly, such practice would conflict with the opposing litigant's right to counsel of its choice.[4] Therefore, the court must strike a balance "between the potential for abuse and those instances where the attorney's testimony may be truly necessary to the opposing party's case."[5]

McGuane Is "likely to be a necessary witness"

The general rule in rule 3.7 states that "[a] lawyer shall not act as advocate at a trial in which the lawyer is likely to be a

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[2] See, *Mutual Group U.S. v. Higgins, supra* note 1; *State ex rel. Line v. Rouse*, 241 Neb. 784, 491 N.W.2d 320 (1992).

[3] See, *Security General Life Ins. v. Superior Court*, 149 Ariz. 332, 718 P.2d 985 (1986); *Smithson v. U.S. Fidelity & Guar. Co.*, 186 W. Va. 195, 411 S.E.2d 850 (1991).

[4] See *Security General Life Ins. v. Superior Court, supra* note 3.

[5] See *Smithson v. U.S. Fidelity & Guar. Co., supra* note 3, 186 W. Va. at 201, 411 S.E.2d at 856.

necessary witness . . . .” Beller contends that the court erred in disqualifying McGuane because Mount Michael failed to establish that McGuane would be a necessary witness.

[3,4] Mount Michael, as the party moving to disqualify opposing counsel, bears the burden of establishing that McGuane's testimony will be necessary.[6] A court cannot order disqualification simply upon the moving party's representation that the lawyer it seeks to disqualify is a necessary witness; the key is the evidence showing that the lawyer is a necessary witness.[7]

[5] A party seeking to call opposing counsel can prove that counsel is a necessary witness by showing that (1) the proposed testimony is material and relevant to the determination of the issues being litigated and (2) the evidence is unobtainable elsewhere.[8] Here, Mount Michael has met both prongs.

First, McGuane's proposed testimony is material and relevant to the issues being litigated. At issue are the defendants' alleged tortious acts and Beller's resulting emotional distress. Mount Michael has shown that not only was McGuane present for events that help form the basis of Beller's complaint, but he also had the opportunity to observe how the defendants' alleged actions affected Beller's emotional state. McGuane's testimony would be material and relevant for determining the claims alleged in Beller's complaint. Therefore, Mount Michael has met the first prong.

Next, Mount Michael cannot obtain McGuane's proposed testimony elsewhere. McGuane witnessed relevant interactions between Beller and the defendants. He also observed Beller's emotional state during relevant periods. We recognize that he was not the only witness to these events: Beller's sons observed the altercation with Gregg; police officers were present at the school during Beller's disagreement with Ridder; and, according to McGuane, Beller's sons and “everyone else near her” has witnessed her emotional distress. Nevertheless, we determine

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[6] See, *McKenzie v. City of Omaha*, 12 Neb. App. 109, 668 N.W.2d 264 (2003); *Eisenstadt v. Eisenstadt*, 282 A.D.2d 570, 723 N.Y.S.2d 395 (2001).

[7] See *McKenzie v. City of Omaha, supra* note 6.

[8] See *Security General Life Ins. v. Superior Court, supra* note 3.

that these other witnesses are unable to provide the same evidence McGuane could provide.

Significant to our decision is McGuane's active participation in relevant altercations between the parties. During the argument between Beller and Gregg, McGuane asked Gregg to leave and later blocked Gregg's car so she could not leave the driveway to follow Beller. When Ridder refused Beller permission to see her son, McGuane involved himself by calling the police. These incidents are relevant to the claims in Beller's complaint. Because of McGuane's active participation and his apparent close personal relationship with Beller, McGuane had a unique perspective of the operational facts. Other witnesses cannot duplicate this perspective. Therefore, Mount Michael has met the second prong.

Because Mount Michael has met both prongs of the above test, it has proved that McGuane is likely to be a necessary witness. Thus, the general rule in rule 3.7 provides that he should not act as Beller's advocate at trial.

McGuane's Disqualification Will Not Work Substantial Hardship on Beller

Having decided that the general rule in rule 3.7 applies, we must consider whether any of the three exceptions to the general rule preclude McGuane's disqualification. The first two exceptions do not apply. The first exception applies when "the testimony relates to an uncontested issue," and the second exception applies when "the testimony relates to the nature and value of legal services rendered in the case."[9] McGuane's testimony would relate to the defendants' actions and their effect on Beller's emotional state—two contested issues unrelated to the nature and value of McGuane's legal services. Thus, we need only consider the third exception, which applies when "disqualification of the lawyer would work substantial hardship on the client."[10]

Beller contends that the third exception applies because McGuane's disqualification would work a substantial hardship

[9] Rule 3.7(a)(1) and (2).

[10] Rule 3.7(a)(3).

on her. Beller argues that McGuane's knowledge of the case is extensive. She asserts that the "sheer number of defendants, the long standing series of conduct, [and] the various legal proceedings that have been involved as a result, would all have to be learned by a new attorney."[11] She also states that although she has local counsel, that counsel has only participated to the extent necessary for McGuane—her "primary counsel"—to appear pro hac vice.[12]

Comment 4 to rule 3.7 recognizes that even when there is a risk of prejudice to the opposing party, "due regard must be given to the effect of disqualification on the lawyer's client." We determine that the effects on Beller are not significant enough to constitute "substantial hardship." Therefore, we agree with Mount Michael's contention that McGuane's disqualification would not work a substantial hardship on Beller.

[6] As noted in comment 4 to rule 3.7, "that one or both parties could reasonably foresee that the lawyer would probably be a witness" is relevant to whether the client will suffer substantial hardship. Beller knew before filing her complaint that McGuane had been personally involved in matters relevant to her case. Therefore, she should have reasonably foreseen that McGuane would probably be a witness at trial.

Also relevant is that Beller has alternative counsel. Beller argues that a new attorney would have to learn the facts surrounding the case. We note, however, that Beller has had local counsel since she filed her complaint. Local counsel appeared for Beller at the hearings on Mount Michael's motion to disqualify. He also appeared for her at McGuane's deposition. Because of his involvement to this point, he should be familiar with this case's background.

We note that other factors may be relevant when determining whether a disqualification will work a substantial hardship on the lawyer's client. Here, however, we determine that these two factors—the foreseeability of McGuane's being a witness and the presence of alternative counsel—establish that McGuane's disqualification would not work a substantial hardship on Beller.

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[11] Brief for appellant at 9.

[12] *Id.* at 10.

We conclude that the third exception in rule 3.7 does not apply under the facts of this case.

CONCLUSION

We conclude that the district court did not err in disqualifying McGuane. Because of his unique perspective on the operational facts, McGuane is likely to be a necessary witness at trial. None of the exceptions in rule 3.7 operate to prevent his disqualification. We affirm the court's disqualification of McGuane under rule 3.7.

AFFIRMED.

BELLE TERRACE, APPELLEE, V. STATE OF NEBRASKA, DEPARTMENT OF HEALTH AND HUMAN SERVICES FINANCE AND SUPPORT, APPELLANT.

742 N.W.2d 237

Filed December 7, 2007. No. S-06-876.

1. **Administrative Law: Judgments: Appeal and Error.** A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record. When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
2. **Administrative Law.** In the absence of anything to the contrary, language contained in a rule or regulation is to be given its plain and ordinary meaning.
3. **Administrative Law: Appeal and Error.** Deference is accorded to an agency's interpretation of its own regulations unless plainly erroneous or inconsistent.
4. **Administrative Law: Statutes: Appeal and Error.** The meaning of a statute is a question of law, and a reviewing court is obligated to reach its conclusions independent of the determination made by the administrative agency.
5. **Appeal and Error.** An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the controversy before it.

Appeal from the District Court for Lancaster County: JODI NELSON, Judge. Reversed and remanded with directions.

Jon Bruning, Attorney General, John L. Jelkin, and, on brief, Douglas D. Dexter for appellant.

Elise Meerkatz and Abbie J. Widger, of Johnson, Flodman, Guenzel & Widger, for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

WRIGHT, J.

NATURE OF CASE

This appeal arises out of a dispute between Belle Terrace and the Department of Health and Human Services Finance and Support (Department) as to what expenses should be considered by the Department in setting the Medicaid reimbursement rate for Belle Terrace. At issue is the cost basis of buildings purchased in 2000.

In June 2003, Belle Terrace submitted a cost report to the Department, claiming the cost basis for its buildings should be the cost of the buildings when they were purchased in 2000. The Department adjusted Belle Terrace's cost basis and requested that Belle Terrace report the 1972 cost of the buildings, which the Department would use to calculate the basis for depreciation. Belle Terrace appealed the audit adjustments to the director of the Department, and the director approved the adjustments. Belle Terrace appealed to the district court, arguing the audit adjustments were in error. The district court reversed the order of the director, and the Department appeals.

SCOPE OF REVIEW

[1] A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record. When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Chase 3000, Inc. v. Nebraska Pub. Serv. Comm.*, 273 Neb. 133, 728 N.W.2d 560 (2007); *Wilson v. Nebraska Dept. of Health & Human Servs.*, 272 Neb. 131, 718 N.W.2d 544 (2006); *Zach v. Eacker*, 271 Neb. 868, 716 N.W.2d 437 (2006); *Mortgage Elec. Reg.*

Sys. v. Nebraska Dept. of Banking, 270 Neb. 529, 704 N.W.2d 784 (2005).

FACTS

Belle Holdings, Inc., doing business as Belle Terrace, is a skilled nursing facility located in Tecumseh, Nebraska. It was constructed in 1972 by the Lynn-Shuey-Schutz Joint Venture, which consisted of Gene Lynn, Keith Shuey, and John and Virginia Schutz. The Lynn-Shuey-Schutz Joint Venture owned the buildings and the real estate. Later, Lynn acquired the Schutzes' interest, giving Lynn a two-thirds interest and Shuey a one-third interest in the Lynn-Shuey Joint Venture.

Belle Holdings, which consisted of David Fleisner, Robert Shambora, and Sharon Colling, subsequently purchased the business operations and the lease of the land and buildings from an entity that had operated the nursing facility and had leased the land and buildings from the Lynn-Shuey Joint Venture.

In 2000, Belle Investments, L.L.C., which was owned by Fleisner, Shambora, Colling, and Shuey, purchased the land and buildings from the Lynn-Shuey Joint Venture. The total purchase price was $1,375,406.50. Belle Investments paid Lynn $916,937.67 and Shuey $458,468.83.

On May 1, 2002, Belle Holdings purchased the land and buildings from Belle Investments and, therefore, owned all the assets of the nursing facility. This was the first time in the nursing facility's history that the entity operating the facility and being reimbursed by Medicare and Medicaid also owned the land and buildings.

On its June 30, 2003, cost report, Belle Terrace listed the land and buildings on its depreciation schedule and included the interest payments and other costs associated with the Housing and Urban Development loan it used to purchase the nursing facility. Belle Terrace reported an adjusted land cost of $36,400 and an adjusted nursing home cost of $950,422. The Department disallowed the depreciation figures and asked Belle Terrace to provide information relating to the original cost of the buildings. When Belle Terrace failed to provide the requested information, the Department disallowed all depreciation expenses in Belle Terrace's cost report. It also disallowed the expense for

interest on the loan for the purchase of the land and buildings, the mortgage insurance protection required by the loan, and the amortization bond expense. The Department found that these were not allowable reimbursement costs based on the adjustment to the depreciation expense.

Belle Terrace appealed the adjustments, and a hearing was held in front of the director of the Department. The director found that the action of the Department in making audit adjustments to Belle Terrace's June 30, 2003, cost report was proper. It therefore affirmed the audit adjustments.

Pursuant to the Administrative Procedure Act, Neb. Rev. Stat. § 84-901 et seq. (Reissue 1999 & Cum. Supp. 2004), Belle Terrace appealed to the district court for Lancaster County. The issues presented to the district court were (1) whether the director erred in affirming the audit adjustments that disallowed Belle Terrace's expenses and (2) whether the director erred in applying the "related party rule" in order to disallow depreciation and interest expenses. The related party rule protects the Department from paying artificially inflated costs that may be generated from less than arm's-length bargaining when a facility is purchased from an organization related to the purchaser by common ownership or control.

The district court determined that the director erred in affirming the adjustments to Belle Terrace's expenses and erred in applying the related party rule in order to disallow the expenses used to calculate Belle Terrace's Medicaid reimbursement rate. It ordered the matter remanded to the Department with directions to allow these expenses as submitted by Belle Terrace on its June 30, 2003, cost report and to recalculate the nursing facility's Medicaid reimbursement rate accordingly. The Department appeals from the district court's order.

ASSIGNMENTS OF ERROR

The Department assigns, restated and consolidated, that the district court erred in finding that its audit adjustments were in error.

ANALYSIS

The central issue in this case is the meaning of the term "in existence" as it was used in 471 Neb. Admin. Code, ch. 12,

§ 011.06H (1992). The resolution of this issue will determine whether the 1972 cost or the 2000 cost of Belle Terrace's buildings should be used as the cost basis to determine depreciation and, in turn, other expenses.

The Department calculated Medicaid reimbursement payment rates for nursing facilities based on required annual cost reports submitted by the facilities and audited by the Department. See 471 Neb. Admin. Code, ch. 12, § 011.08B (2002). The Medicaid reimbursement rates were based on each facility's allowable costs incurred and documented in the cost report. See 471 Neb. Admin. Code, ch. 12, § 011.08D (2002). The Department then determined the facility-specific prospective per diem rate subject to certain limitation provisions.

At all times relevant to this case, § 011.06H provided that the fixed cost basis for facilities purchased as an ongoing operation was the lesser of the following:

> 1. The acquisition cost of the asset to the new owner;
>
> 2. The acquisition cost which is approved by the [Department] Certificate of Need process; or
>
> 3. For facilities purchased as an ongoing operation on or after December 1, 1984, the allowable cost of the asset to the owner of record as of December 1, 1984, or for assets not *in existence* as of December 1, 1984, the first owner of record thereafter.

(Emphasis supplied.) This section of the Nebraska Administrative Code used language similar to a federal Medicare regulation. See Medicare's "Provider Reimbursement Manual," part I, § 104.10(C). The federal Medicare regulations on depreciation define an asset "not in existence" as "any asset that physically existed, but was not owned by a hospital or [skilled nursing facility] participating in the Medicare program as of July 18, 1984." § 104.10(C)(1). The Nebraska Administrative Code did not define the term "in existence" but specifically stated that the Nebraska Administrative Code "replaces Medicare regulations on depreciation in their entirety." 471 Neb. Admin. Code, ch. 12, § 011.09 (2002).

The Department maintains that although the Nebraska Administrative Code employs virtually the same language as the federal Medicare regulation, Nebraska has not adopted the

federal Medicare definition of "in existence." The Department claims that "in existence" has a plain and ordinary meaning—physical existence—and that the term should be afforded such meaning. The Department further claims that the federal Medicare definition of "in existence" found in the depreciation section of the Medicare regulations does not apply because the Nebraska Administrative Code "replaces Medicare regulations on depreciation in their entirety," except for a small exception not applicable hereto. See § 011.09. The Department argues that because the Belle Terrace buildings physically existed on December 1, 1984, "the allowable cost of the asset to the owner of record" as of that date should have been used to calculate depreciation for purposes of Medicaid reimbursement. See § 011.06H.

Belle Terrace relies on the federal Medicare definition in arriving at its depreciation figures. Its position is that although the buildings physically existed, the buildings were not "in existence" for Medicaid purposes until they were owned by a skilled nursing facility participating in the Medicaid program, i.e., when Belle Holdings purchased the property and brought the property and operations under one ownership umbrella. Belle Terrace argues that the federal Medicare definition of "in existence" should be used because (1) the term "in existence" is ambiguous, (2) the term "in existence" has a peculiar and appropriate meaning in the reimbursement industry, and (3) federal authorities have not sanctioned the Department's definition of "in existence" because the Department failed to provide the required notice.

The district court found that the Department's regulations had created an ambiguity between state and federal law. The court stated that Nebraska had adopted into its administrative code language similar to that used in a federal Medicare regulation but that the Department was interpreting the term differently. The court noted that Nebraska had not adopted the federal Medicare definition of "in existence," yet no alternative definition was provided. Thus, according to the court, "Medicaid providers are left to guess whether the term 'in existence' should be afforded the meaning provided by federal regulations or the different definition argued for by the [Department]." The

court further found that the federal Medicare definition of "in existence" was commonly used in the Medicaid industry and that Belle Terrace was reasonable in relying on that definition in preparing its annual cost report. The court stated that if the Department "had intended to use a different meaning, it should have specifically redefined the term in order to avoid confusion." The court concluded that Belle Terrace should be reimbursed for depreciation of its nursing facility based on the historical cost of the building in 2000 when the nursing home was purchased by Belle Investments.

[2-4] In our review of the order of the district court, we are guided by the following principles: It is a rule of statutory interpretation that in the absence of anything to the contrary, language contained in a rule or regulation is to be given its plain and ordinary meaning. See, *City of Alliance v. Box Butte Cty. Bd. of Equal.*, 265 Neb. 262, 656 N.W.2d 439 (2003); *Utelcom, Inc. v. Egr*, 264 Neb. 1004, 653 N.W.2d 846 (2002). Deference is accorded to an agency's interpretation of its own regulations unless plainly erroneous or inconsistent. *Sunrise Country Manor v. Neb. Dept. of Soc. Servs.*, 246 Neb. 726, 523 N.W.2d 499 (1994); *In re Application of Jantzen*, 245 Neb. 81, 511 N.W.2d 504 (1994). The meaning of a statute is a question of law, and a reviewing court is obligated to reach its conclusions independent of the determination made by the administrative agency. *Sunrise Country Manor*, *supra*; *Central Platte NRD v. State of Wyoming*, 245 Neb. 439, 513 N.W.2d 847 (1994).

After considering these principles, we reach our own conclusion independent of that of the district court. We find that the meaning of the term "in existence" is unambiguous; that the plain, direct, and ordinary meaning of "in existence" is physical existence; that the Department has consistently interpreted "in existence" to mean physical existence; and that the Department's regulations provided the proper notice.

The language of § 011.09 clearly states that the Nebraska Administrative Code replaces the federal Medicare regulations on depreciation except as provided within the code. Thus, the term "in existence" must be given its plain and ordinary meaning, which is clearly physical existence. Giving the term "in

existence" its plain and ordinary meaning, it is apparent that the Belle Terrace facility was constructed in 1972 and, therefore, was "in existence" in 1984.

The federal Medicare regulations relating to depreciation have not been adopted by the State of Nebraska with regard to Medicaid. More importantly, the record from the hearing before the Department establishes that the Department does not use Medicare's definition of the term "in existence." The record indicates that the Department has consistently applied the plain meaning of the term "in existence" in determining depreciation of nursing facilities for purposes of Medicaid reimbursement and that there have been no deviations in the application of this policy in the past. The Department's exclusion of the federal definition of "in existence" along with its consistent application of the plain meaning of "in existence" placed Belle Terrace on notice that "in existence" meant physical existence.

How an agency interprets its own regulations is a clear indication of the meaning of a term that the agency uses in its regulations. The Department's senior auditor testified that the Department has consistently interpreted § 011.06H to require that for facilities physically in existence and purchased as an ongoing operation after December 1, 1984, the cost basis is the allowable cost of the asset to the owner of record as of December 1, 1984. Therefore, because Belle Terrace has been in existence since 1972, the 1972 cost must be used as the basis for depreciation because the buildings physically existed on December 1, 1984.

We therefore conclude that the order of the district court directing that Belle Terrace should receive depreciation reimbursement based on the historical cost of the nursing home at the time of the purchase of Belle Investments in 2000 was in error in that it did not conform to the law and was not supported by competent evidence.

[5] The Department also claims that the district court erred in finding that the Lynn-Shuey Joint Venture and Belle Investments were not related parties. Since we have decided the cause on the issues raised above, we decline to consider this issue. An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the controversy before it. *Papillion Rural*

Fire Prot. Dist. v. City of Bellevue, ante p. 214, 739 N.W.2d 162 (2007).

CONCLUSION

We reverse the judgment of the district court for Lancaster County and remand the cause with directions to reinstate the director's order.

REVERSED AND REMANDED WITH DIRECTIONS.

IN RE INTEREST OF LAURANCE S., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. LAURANCE S., APPELLANT.

IN RE INTEREST OF MICHAEL S., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. MICHAEL S., APPELLANT.

742 N.W.2d 484

Filed December 7, 2007. Nos. S-06-1439, S-06-1443.

1. **Juvenile Courts: Appeal and Error.** Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court's findings.
2. **Statutes: Appeal and Error.** The interpretation of a statute is a question of law for an appellate court.
3. **Minors: Juvenile Courts.** A juvenile proceeding is not a prosecution for a crime but a special proceeding that serves as an ameliorative alternative to a criminal prosecution, and the purpose of Nebraska's statutes relating to youthful offenders is the education, treatment, and rehabilitation of the child.
4. **Juvenile Courts: Restitution.** When a juvenile court enters an order of restitution under Neb. Rev. Stat. § 43-286(1)(a) (Reissue 2004), the court should consider, among other factors, the juvenile's earning ability, employment status, financial resources, and other obligations.
5. **Appeal and Error.** An appellate court may, at its discretion, discuss issues unnecessary to the disposition of an appeal when those issues are likely to recur during further proceedings.
6. **Juvenile Courts: Restitution: Proof.** A juvenile court may use any rational method of fixing the amount of restitution, so long as the amount is rationally related to the proofs offered at the dispositional hearing, and the amount is consistent with the purposes of education, treatment, rehabilitation, and the juvenile's ability to pay.

Appeals from the County Court for Dodge County: KENNETH VAMPOLA, Judge. Reversed and remanded for further proceedings.

Christina C. Boydston, of Register Law Office, for appellant Laurance S.

Melissa Lang Schutt for appellant Michael S.

Jeri L. Grachek, Deputy Dodge County Attorney, for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MILLER-LERMAN, J.

NATURE OF CASE

These delinquency proceedings were brought under the Nebraska Juvenile Code, Neb. Rev. Stat. §§ 43-245 to 43-2,129 (Reissue 2004 & Cum. Supp. 2006) against appellants Laurance S., case No. S-06-1439, and Michael S., case No. S-06-1443. We consolidate these cases for purposes of opinion and disposition. Juvenile proceedings were instituted in the county court for Dodge County alleging that Laurance and Michael, who are brothers, had committed felony criminal mischief. Based on their pleas of no contest, each appellant was adjudicated under § 43-247(2). Following a dispositional hearing, appellants were placed on indefinite probation with restrictions and ordered to pay restitution. Appellants appeal from that portion of the dispositional order that required each of them to pay $29,059.96. As discussed below, we conclude that an order of restitution under § 43-286(1)(a) should serve the rehabilitative purposes of the Nebraska Juvenile Code, and we further conclude that the juvenile court erred when it failed to consider appellants' financial ability to pay restitution in the amount ordered. We reverse the orders in part and remand the causes for further proceedings consistent with this opinion.

STATEMENT OF FACTS

There is essentially no dispute with regard to the material facts. On August 18, 2006, appellants broke into Washington

Elementary School in Fremont, Nebraska, where they proceeded to damage five classrooms. Appellants set off fire extinguishers, broke computer monitors, and splattered paint and glue on the walls, ceilings, desks, books, computers, and carpets. Shortly thereafter, appellants came forward to authorities and admitted responsibility for the incident. On August 30, separate juvenile petitions were filed in the county court for Dodge County, alleging that appellants had committed the Class IV felony of criminal mischief in violation of Neb. Rev. Stat. § 28-519 (Cum. Supp. 2006). Appellants each pled no contest to the allegations in the petitions, and as a result, each was adjudicated a child as defined in § 43-247(2) on September 19.

On November 20, 2006, a dispositional and restitution hearing was held in both juvenile proceedings. Restitution is permitted in juvenile cases under § 43-286(1)(a). Relative to the restitution issue, the State called four witnesses, including several individuals from the Fremont Public School District, and offered 28 exhibits into evidence. The evidence showed that the school district had incurred expenses in order to replace or repair property damaged by appellants in the total amount of $29,059.96. On November 30, the court entered dispositional orders under which it placed each appellant on indefinite probation with restrictions and ordered each appellant to pay restitution, presumably to the school district, in the amount of $29,059.96. Appellants appeal.

ASSIGNMENTS OF ERROR

On appeal, appellants assign several errors contesting only the restitution portion of the dispositional order entered in their respective case. The primary assignment of error, which we restate and summarize, is a claim that the juvenile court erred when it failed to consider appellants' financial resources in ordering restitution. Appellants assert additional assignments of error challenging the method by which the juvenile court determined the amount of restitution that it ordered.

STANDARD OF REVIEW

[1] Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent

of the juvenile court's findings. *In re Interest of Jeffrey K.*, 273 Neb. 239, 728 N.W.2d 606 (2007).

ANALYSIS

Together, these appeals raise issues as to the propriety of the juvenile court's having ordered appellants to pay restitution in the amount determined by the court and the proper approach juvenile courts should use in setting a restitution amount under § 43-286(1)(a). More specifically, appellants claim that the juvenile court failed to consider their ability to pay the restitution amount established by the court and that the amount determined was not reached in a reasonable manner.

In connection with their primary assignment of error regarding ability to pay, appellants assert that before setting the restitution amount, the juvenile court should have heard and considered evidence concerning appellants' employment history and their ability to work, as well as appellants' financial resources. In support of their arguments, appellants suggest that factors similar to those considered in criminal restitution proceedings should be considered by the court when ordering restitution in juvenile cases.

Appellants refer this court to the criminal restitution statute, Neb. Rev. Stat. § 29-2281 (Reissue 1995), which provides, in pertinent part, as follows:

> To determine the amount of restitution, the court may hold a hearing at the time of sentencing. [In determining the amount of restitution the] court shall consider the defendant's earning ability, employment status, financial resources, and family or other legal obligations and shall balance such considerations against the obligation to the victim. . . . The court may order that restitution be made immediately, in specified installments, or within a specified period of time not to exceed five years after the date of judgment or defendant's final release date from imprisonment, whichever is later.

Although we have previously held that criminal restitution statutes do not control in juvenile proceedings, see *In re Interest of Brandon M.*, 273 Neb. 47, 727 N.W.2d 230 (2007), we agree with appellants that the factors listed in § 29-2281 may

serve as useful guidelines in setting restitution amounts in juvenile proceedings.

We begin our analysis by reference to well-established principles involving juvenile proceedings. As we stated in *In re Interest of Brandon M.*, 273 Neb. at 51, 727 N.W.2d at 234:

> We have long recognized that a juvenile court proceeding is not a prosecution for crime, but a special proceeding that serves as an ameliorative alternative to a criminal prosecution. [Citations omitted.] The purpose of our statutes relating to the handling of youthful offenders is the education, treatment, and rehabilitation of the child, rather than retributive punishment. [Citations omitted.] The emphasis on training and rehabilitation, rather than punishment, is underscored by the declaration that juvenile proceedings are civil, rather than criminal, in nature.

See, also, *In re Interest of Brandy M. et al.*, 250 Neb. 510, 524, 550 N.W.2d 17, 26 (1996) (stating that "the foremost purpose and objective of the Nebraska Juvenile Code is to promote and protect the juvenile's best interests"); *In re Interest of A.M.H.*, 233 Neb. 610, 614, 447 N.W.2d 40, 44 (1989) (quoting *In re T. D.*, 81 Ill. App. 3d 369, 401 N.E.2d 275, 36 Ill. Dec. 594 (1980)) (stating that primary purpose of juvenile code "'is remedial and preventive rather than punitive'").

The Nebraska Juvenile Code authorizes a court to order "restitution of any property stolen or damaged" by a juvenile as a term and condition of a dispositional order if it is "in the interest of the juvenile's reformation or rehabilitation." § 43-286(1)(a). See, also, Neb. Rev. Stat. § 43-246 (Reissue 2004) (allowing restorative approach by providing "(4) . . . selected juveniles the opportunity to take direct personal responsibility for their individual actions by reconciling with the victims through juvenile offender and victim mediation and fulfilling the terms of the resulting agreement which may require restitution and community service," consistent with "the responsibility of the juvenile court to act to preserve the public peace and security").

Unlike the provisions in the juvenile codes or rules of other states, § 43-286(1)(a) of the Nebraska Juvenile Code does not prescribe any particular method by which to determine whether restitution is appropriate or the amount of restitution

to be awarded. See, e.g., *In re R.T.*, No. 0408020557, 2005 WL 1420878 at *3 (Del. Fam. Feb. 28, 2005) (unreported decision) (discussing Delaware Family Court Criminal Procedure Rule outlining "guidelines" for awarding restitution); *In re R.V.*, 283 Ga. App. 355, 356, 641 S.E.2d 591, 592 (2007) (stating that Georgia juvenile statute "requires the juvenile court to conduct a hearing and consider multiple factors in determining the amount of restitution"); *In re T.M.R.*, 334 Mont. 64, 144 P.3d 809 (2006) (stating that Montana juvenile statute lists factors for court to consider in determining whether restitution is appropriate).

Because Nebraska's juvenile code does not provide guidelines to courts entering restitution orders, there is a risk that an order could be entered imposing a restitution amount that is unreasonable and inconsistent with the purpose of the juvenile code. Such an order could give rise to frustration that would negate the juvenile code's rehabilitative purpose. "'The result of such [an order] would not be rehabilitation. Rather, it would give the [juvenile] a sense of unfairness, injustice and bitterness towards the system because the chance to reform would not be present.'" *State v. Kristopher G.*, 201 W. Va. 703, 705, 500 S.E.2d 519, 521 (1997) (quoting *State v. M.D.J.*, 169 W. Va. 568, 289 S.E.2d 191 (1982)). Moreover, a restitution order without specific requirements and time commitments as to when restitution must be paid similarly fails to permit the juvenile to feel that he or she is gainfully making amends for past transgressions. See *id.* at 706, 500 S.E.2d at 522 (stating that "[a]ny restitution award should . . . be set in an amount that is within the realistic ability of the children to pay within a reasonable period of time, so that they can complete a probationary period, put . . . events behind them, and move forward").

Finally, a restitution order "imposed . . . in an appropriate manner serves the salutary purpose of making the offender understand that he has harmed not merely society in the abstract but also individual human beings, and that he has a responsibility to" the victim. *In re Brian S.*, 130 Cal. App. 3d 523, 529, 181 Cal. Rptr. 778, 780 (1982). This "salutary purpose" would be directly undermined by the imposition of a restitution order that the juvenile is financially unable to pay.

[2,3] The interpretation of a statute is a question of law for an appellate court, see *In re Interest of DeWayne G. & Devon G.*, 263 Neb. 43, 638 N.W.2d 510 (2002), and we read § 43-286(1)(a) as being consistent with the overall purposes of the Nebraska Juvenile Code. See *Citizens for Eq. Ed. v. Lyons-Decatur Sch. Dist., ante* p. 278, 290, 739 N.W.2d 742, 754 (2007) (stating that court's "role, to the extent possible, is to give effect to the statute's entire language"). Section 43-2,128 provides that the Nebraska Juvenile Code should be liberally construed to the end that its purposes may be carried out. Sections 43-246 and 43-246(3) provide that the Nebraska Juvenile Code shall be construed to reduce the possibility of juveniles committing future law violations. We have observed in a delinquency case that a juvenile proceeding is not a prosecution for a crime but a special proceeding that serves as an ameliorative alternative to a criminal prosecution and that the purpose of our statutes relating to youthful offenders is the education, treatment, and rehabilitation of the child. See *In re Interest of Brandon M.*, 273 Neb. 47, 727 N.W.2d 230 (2007). We consider § 43-246(1)(a) to be consistent with these purposes of the juvenile code, and we believe it would be prudent that juvenile courts consider factors similar to those utilized in the criminal restitution statute when entering restitution orders during the dispositional phase of a delinquency proceeding.

[4] Referring to the criminal restitution statute merely for guidance, we determine that when a juvenile court enters an order of restitution under § 43-286(1)(a), the court should consider, among other factors, the juvenile's earning ability, employment status, financial resources, and other obligations. Compare § 29-2281. In appropriate cases, it would be consistent with these considerations and the purposes of the juvenile code for the court to require that the juvenile obtain and maintain employment in order to satisfy his or her restitution obligations and his or her responsibility to repay the victim. Moreover, the juvenile court should set a timetable for restitution payments and may order that restitution be made immediately, in specified installments, or within a specified period of time.

In the instant cases, the record does not disclose information regarding appellants' ability to pay restitution, other than the fact

that appellants were deemed eligible for appointed counsel. The record does not reflect that the juvenile court considered appellants' ability to pay restitution when it entered its dispositional orders requiring each appellant to pay $29,059.96. The juvenile court erred in entering the restitution portions of its dispositional orders, and we reverse those portions of the juvenile court's dispositional orders relating to restitution entered in these juvenile proceedings and remand the causes for further proceedings consistent with this opinion. The remaining portions of the dispositional orders are not affected by our ruling.

[5] Although we have concluded that the restitution portions of the juvenile court's dispositional orders must be reversed and the causes remanded for further proceedings, we briefly address appellants' assignment of error to the effect that the juvenile court erred when it ordered restitution based upon the replacement cost of the items damaged rather than on fair market value. This issue is likely to recur on remand. An appellate court may, at its discretion, discuss issues unnecessary to the disposition of an appeal when those issues are likely to recur during further proceedings. *Papillion Rural Fire Prot. Dist. v. City of Bellevue, ante* p. 214, 739 N.W.2d 162 (2007).

Appellants claim on appeal that the evidence provided by the school district was limited to the replacement value of the property damaged by appellants and that the juvenile court erred in ordering restitution based upon replacement value. We note that there is some dispute among the parties as to whether "replacement value" is an accurate term for certain of the valuations provided by the school district. Given our discussion of this assignment of error on appeal, it is not necessary for us to resolve this dispute.

As noted above, § 43-286(1)(a) authorizes the juvenile court to order a juvenile to pay "restitution of any property stolen or damaged" as a dispositional term. We have previously stated that "restitution encompasses the '[r]eturn or restoration of some specific thing to its rightful owner' or '[c]ompensation for loss.'" *In re Interest of Brandon M.*, 273 Neb. 47, 52, 727 N.W.2d 230, 235 (2007). In *In re Interest of Brandon M.*, the juvenile court stated that the dollar amount of the restitution order was "'plucked . . . out of the air,'" and we reversed the

restitution order because it lacked a basis in the record. 273 Neb. at 49, 727 N.W.2d at 233. We did not determine in *In re Interest of Brandon M.*, however, the valuation approach to be used to determine a juvenile offender's restitution obligation. Instead, we stated that "[a]lthough strict rules of evidence do not apply at dispositional hearings in juvenile cases, see *In re Interest of Rebecka P.*, 266 Neb. 869, 669 N.W.2d 658 (2003), and § 43-283, the record must nevertheless support the court's action in imposing restitution." *In re Interest of Brandon M.*, 273 Neb. at 52, 727 N.W.2d at 235.

[6] In the instant case, appellants urge us to adopt specific rules regarding a valuation approach for restitution orders in juvenile cases. In this regard, appellants discuss the relative virtue of fair market value as compared to replacement value in restitution orders. The juvenile statutes do not require us to adopt one method, and we decline to do so. Instead, we conclude that juvenile courts should have discretion to set the amount of restitution based on the record presented and the juvenile's ability to pay and that the amount ordered be consistent with the purposes of the Nebraska Juvenile Code. As we stated in *In re Interest of Brandon M.*, the record must support the juvenile court's restitution order. The juvenile courts may use any rational method of fixing the amount of restitution, so long as the amount is rationally related to the proofs offered at the dispositional hearing, and the amount is consistent with the purposes of education, treatment, rehabilitation, and the juvenile's ability to pay. Compare *In re Dina V.*, 151 Cal. App. 4th 486, 59 Cal. Rptr. 3d 862 (2007).

We have considered appellants' remaining arguments made in connection with their assignments of error, and we conclude they are without merit.

CONCLUSION

We conclude that the restitution orders entered under § 43-286(1)(a) in delinquency proceedings must be supported by the record and that the amount ordered must be consistent with the educational, treatment, and rehabilitative purposes of the Nebraska Juvenile Code and the juvenile's ability to pay. On the record before us, we determine that the juvenile court

erred in these cases when it failed to consider whether appellants had the ability to pay restitution in the amount entered in the dispositional orders. Accordingly, we reverse the portion of each dispositional order that ordered each appellant to pay $29,059.96 and we remand the causes for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

AURORA RAMIREZ MASKA, APPELLANT, V.
JOEL DEAN MASKA, APPELLEE.
742 N.W.2d 492

Filed December 7, 2007. No. S-07-187.

1. **Child Custody: Appeal and Error.** Child custody determinations are matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion.
2. **Divorce: Child Custody**. When custody of a minor child is an issue in a proceeding to dissolve the marriage of the child's parents, child custody is determined by parental fitness and the child's best interests.
3. **Child Custody.** When both parents are found to be fit, the inquiry for the court is the best interests of the children.
4. **Judges: Words and Phrases.** A judicial abuse of discretion requires that the reasons or rulings of a trial judge be clearly untenable, unfairly depriving a litigant of a substantial right and a just result.

Appeal from the District Court for Buffalo County: JOHN P. ICENOGLE, Judge. Affirmed.

Kay E. Tracy, of Legal Aid of Nebraska, for appellant.

Kent A. Schroeder, of Ross, Schroeder & George, for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

WRIGHT, J.

NATURE OF CASE

The Buffalo County District Court entered a decree dissolving the marriage of Joel Dean Maska and Aurora Ramirez

Maska. The court awarded custody of the couple's two minor children to Joel. The order provided that Joel would have custody of the children during the school year and that Aurora would have custody during the summer. The parties were previously involved in a legal separation, and at the time of the separation, their property was divided and their debts were allocated. Neither party appeals the division of property or allocation of debt. Aurora appeals the order involving custody of the minor children.

SCOPE OF REVIEW

[1] Child custody determinations are matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion. *Gress v. Gress*, 271 Neb. 122, 710 N.W.2d 318 (2006).

FACTS

The parties were married on July 19, 2000, in Bogotá, Colombia, South America. Two children were born of the marriage, the first on February 26, 2001, and the second on June 20, 2002. During the marriage, difficulties arose between the parties and efforts to reconcile their differences were unsuccessful. Because of the parties' prior legal separation, the primary issue presented in this case was the custody and support of the minor children.

During the pendency of the divorce proceedings, a juvenile petition was filed in the Buffalo County Court and allegations were made by both parties concerning physical and emotional abuse of the children. The children were placed in the legal custody of the Department of Health and Human Services (DHHS). On May 25, 2005, the juvenile court found that the children's best interests required that they continue in the legal custody of DHHS. The juvenile court found that Aurora was depressed for a variety of reasons, including separation from members of her family left in Colombia, her inability to fluently speak English, and the fact that she had been raised in a very poor environment in Colombia and was likely to view herself as unable to control her future. She was described by a psychologist as being "volatile."

Joel was described by the juvenile court as being outgoing, confident, and balanced but also suffering from situational depression. At that time, the juvenile court found that neither parent was in a position to provide for the children if placed in their individual custody.

On December 20, 2005, the juvenile court entered an order dismissing the proceedings and terminating DHHS' custody of the children. A DHHS representative testified in the district court that the dismissal was based upon a finding by DHHS that the allegations of abuse were unfounded.

At the time of the divorce proceedings and during the time that the juvenile court had jurisdiction of the children, both parents participated in extensive counseling services and completed parenting classes. The district court found that the children had some adjustment problems but that, generally, the children appeared to be relatively well-adjusted and raised no parenting concerns as to either parent.

At trial, Dr. John Meidlinger, a licensed clinical psychologist, testified and opined as to the best interests of the children concerning the issues of custody and visitation. He had been involved with the family on an evaluation basis since the juvenile court proceedings. Meidlinger conducted a custody evaluation of the parties and testified that neither parent was unfit and that the children were remarkably well adjusted given the volatility of the parental relationship. He stated that both parties had tried to cut the other off from the children and that both had anger and resentment issues concerning the other parent. He testified that the children had important relationships with each other but that the current parenting time schedule was not in the children's best interests because it required movement of the children from one home to another on a frequent basis.

Meidlinger opined that Joel was the warmer and more supportive parent and that Aurora exhibited dependency characteristics tending to represent herself as helpless and in need of various agency and private programs. Meidlinger recommended that primary physical custody of the children be given to Joel during the school year and to Aurora during the summer months. He also stated that the court should retain legal custody of the children for a 1-year period to ensure that the parties

could properly adjust, parent, and discontinue the harmful parental relationship.

The district court found that the parties had had a violent and abusive relationship toward each other for at least 6 years and had exhibited traits of physical violence toward each other. After 18 months of intervention by DHHS, the parties' relationship had improved but not to the point where they could interact civilly or jointly parent the children.

The district court concluded that the custody of the minor children should be placed with Joel, subject to Aurora's parenting time as set forth in the decree. In the decree, the court stated that Joel would be the primary custodial parent during the school year and that Aurora would be the primary custodial parent during the summer months. Specific times and dates were set forth in the decree.

The order provided that each party was entitled to receive educational information concerning the progress the children were making in school and other daycare activities. Both parties were entitled to communicate with the school and other daycare personnel concerning the progress of the children and would be entitled to receive the respective educational programs and agency schedules of the children's events. Both parties were also allowed to receive information from all health care providers concerning the health status of the children, and each parent was allowed to make medical decisions on an emergency basis for the benefit of the children when the children were in his or her physical custody.

Based upon the parenting time schedule set forth in the decree and using the joint custody formula, the district court ordered Joel to pay child support of $78 per month. The children were receiving Social Security benefits of $555 per child per month, and these benefits were appropriately proportioned between the parties to ensure the care and well-being of the children while they were in each parent's physical custody. The court found that Aurora should receive 46 percent and Joel 54 percent of the Social Security benefits being paid for the benefit of the children. Joel was ordered to pay 65 percent of the daycare expenses necessary for employment and the same percentage of any medical expenses not reimbursed by a third party.

ASSIGNMENTS OF ERROR

Aurora claims the district court erred by failing to make specific findings of parental fitness and best interests of the children; erred by not recognizing the evidence showed that Joel was unable or unwilling to fulfill his primary obligation—to promote and facilitate a relationship between the children and Aurora, the noncustodial parent; and erred by using Aurora's national origin and language as a factor against her when evaluating the best interests of the children.

ANALYSIS

Aurora claims the district court failed to make specific findings regarding the fitness of the parents and the best interests of the children. We conclude there is no merit to this argument. Although the court did not specifically state what was in the children's best interests with regard to custody, such was implied in its custody order. The court recounted that Meidlinger had given his opinion as to the children's best interests concerning custody and visitation and had recommended that primary physical custody be given to Joel during the school year. Many of the facts the court described went directly to the issue of fitness. Meidlinger testified that neither parent was unfit. By adopting Meidlinger's findings concerning fitness and best interests, the court made its determination that both parties were fit for custody.

[2,3] The next issue was which parent should have physical custody for a majority of the time. When custody of a minor child is an issue in a proceeding to dissolve the marriage of the child's parents, child custody is determined by parental fitness and the child's best interests. *Gress v. Gress*, 271 Neb. 122, 710 N.W.2d 318 (2006). When both parents are found to be fit, the inquiry for the court is the best interests of the children. *Id.* In determining a child's best interests under Neb. Rev. Stat. § 42-364 (Cum. Supp. 2006), courts may consider factors such as general considerations of moral fitness of the child's parents, including the parents' sexual conduct; respective environments offered by each parent; the emotional relationship between child and parents; the age, sex, and health of the child and the parents; the effect on the child as the result of continuing or disrupting an

existing relationship; the attitude and stability of each parent's character; parental capacity to provide physical care and satisfy educational needs of the child; and many other factors relevant to the general health, welfare, and well-being of the child. See *State on behalf of Pathammavong v. Pathammavong*, 268 Neb. 1, 679 N.W.2d 749 (2004).

[4] Child custody determinations are matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion. *Gress v. Gress, supra*. A judicial abuse of discretion requires that the reasons or rulings of a trial judge be clearly untenable, unfairly depriving a litigant of a substantial right and a just result. *Marcovitz v. Rogers*, 267 Neb. 456, 675 N.W.2d 132 (2004).

In the case at bar, Aurora argues the evidence showed that Joel was either unfit or did not promote the children's best interests because he was either unable or unwilling to fulfill what she deemed the primary obligation of all custodial parents, that is, to promote and facilitate a relationship with the noncustodial parent. We disagree. The record does not establish that either parent was unfit, although it was clear that the parties had had a "violent and abusive relationship towards each other for at least 6 years."

Aurora has not stated any proposition of law specifically requiring that in order to be granted custody, the custodial parent must promote and facilitate a relationship with the noncustodial parent. She relies on two cases from the Nebraska Court of Appeals: *Smith v. Smith*, 9 Neb. App. 975, 623 N.W.2d 705 (2001), and *Kay v. Ludwig*, 12 Neb. App. 868, 686 N.W.2d 619 (2004). It is true that these cases mention the promotion and facilitation of a relationship with the noncustodial parent, but they do not state that this was a completely determinative factor in the decision of whom to award custody. While the promotion and facilitation of a relationship with the noncustodial parent is a factor that may be considered, it is not the only factor nor is it a completely determinative factor.

In its findings, the district court noted that both parties had tried to cut the other off from the children and that both parties had anger and resentment issues concerning the other parent.

However, the court specifically noted that Meidlinger, the child psychologist who had been involved with the parties during the juvenile court proceedings and during the dissolution, testified that neither parent was unfit. There was no evidence that described Joel as unfit, and there was evidence in the record that Joel was and had been the children's primary caregiver. Joel was described as a warmer and more supportive parent, while Aurora tended to represent herself as helpless. Meidlinger reported that Joel would be the better parent to have primary physical custody during the school year and that Aurora needed to demonstrate the ability to support a relationship between the children and Joel.

There is evidence in the record that supports the district court's determination that Joel is a fit parent and promotes the best interests of the children. We therefore conclude there is no merit to this argument.

Aurora's final argument is that the district court abused its discretion by using her national origin and language as a factor against her when evaluating the best interests of the children. Her argument has no merit. The court's decree does not state that it used Aurora's national origin or language as a factor. Meidlinger recommended to the court that the primary physical custody of the children be given to Joel during the school year and to Aurora during the summer months. That is the recommendation the court adopted, and we find no abuse of discretion in the court's decision.

CONCLUSION

For the reasons set forth above, we conclude that the district court did not abuse its discretion in the award of custody that was entered. We therefore affirm the judgment of the district court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
ROBERT D. MCCULLOCH, APPELLANT.
742 N.W.2d 727

Filed December 14, 2007. No. S-06-275.

1. **Judgments: Appeal and Error.** On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
2. **Effectiveness of Counsel: Records: Trial: Evidence: Appeal and Error.** A claim of ineffective assistance of counsel need not be dismissed merely because it is made on direct appeal. The determining factor is whether the record is sufficient to adequately review the question.
3. **Trial: Evidence: Appeal and Error.** If a matter has not been raised or ruled on at the trial level and requires an evidentiary hearing, an appellate court will not address the matter on direct appeal.
4. **Double Jeopardy: Evidence: New Trial: Appeal and Error.** The Double Jeopardy Clause does not forbid a retrial so long as the sum of all the evidence admitted by a trial court, whether erroneously or not, would have been sufficient to sustain a guilty verdict.

Petition for further review from the Court of Appeals, IRWIN, SIEVERS, and CARLSON, Judges, on appeal thereto from the District Court for Burt County, DARVID D. QUIST, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

Matthew M. Munderloh, of Johnson & Mock, for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MILLER-LERMAN, J.

NATURE OF CASE

Robert D. McCulloch appealed his conviction for first degree sexual assault to the Nebraska Court of Appeals. The Court of Appeals determined that McCulloch had received ineffective assistance of counsel at trial and reversed his conviction. The Court of Appeals concluded that "all the evidence presented by the State" at trial was insufficient to support a conviction

and remanded the cause to the district court for Burt County with directions to dismiss the charges against McCulloch. *State v. McCulloch*, 15 Neb. App. 616, 623, 733 N.W.2d 586, 592 (2007). We granted the State's petition for further review. We reverse the decision of the Court of Appeals and remand the cause to the Court of Appeals with instructions to affirm McCulloch's conviction and sentence.

STATEMENT OF FACTS

The State charged McCulloch with first degree sexual assault, alleging that he subjected his 13-year-old niece, P.M., to sexual penetration at a time when he was 19 years of age or older. See Neb. Rev. Stat. § 28-319(1)(c) (Reissue 1995). McCulloch's age at the time of the alleged crime is an element under § 28-319(1)(c). A jury found McCulloch guilty, and the court sentenced him to 8 to 15 years' imprisonment. No direct appeal was taken. McCulloch filed a postconviction action alleging that counsel was ineffective for failing to take a direct appeal, and the court granted relief in the form of the right to file the present direct appeal.

On appeal to the Court of Appeals, McCulloch asserted, inter alia, that he had received ineffective assistance of counsel because defense counsel elicited the only evidence at trial that proved that he was 19 years of age or older at the time of the incident. The Court of Appeals initially rejected this assignment of error. *State v. McCulloch*, 15 Neb. App. 381, 727 N.W.2d 717 (2007) (*McCulloch I*). In *McCulloch I*, the Court of Appeals concluded that regardless of whether counsel's performance was deficient, McCulloch was not prejudiced by such performance because the State had adduced sufficient circumstantial evidence to allow the trier of fact to infer that McCulloch was at least 19 at the time of the crime. The Court of Appeals noted that McCulloch was present in court, was identified by witnesses, and testified in his own behalf and that therefore, his physical appearance was open to view by the jury. The Court of Appeals stated that a defendant's physical appearance may be considered by the jury in determining his or her age. The Court of Appeals noted that there was other circumstantial evidence of McCulloch's age, which in itself was insufficient to

prove his age but which combined with the observation of his physical appearance allowed the jury to reasonably infer that he was at least 19. Such circumstantial evidence noted by the Court of Appeals in *McCulloch I* consisted of P.M.'s references to McCulloch as her father's brother or her uncle and evidence that McCulloch had a sexual relationship with P.M.'s mother 3 years prior to the incident with P.M.

After *McCulloch I* was released, McCulloch moved the Court of Appeals for rehearing. He argued, inter alia, that testimony regarding his sexual relationship with P.M.'s mother was elicited by his own counsel rather than by the State and that therefore, to the extent such evidence supported a finding that he was 19 or older, such fact did not support a finding of no prejudice but instead supported his claim that counsel was ineffective for putting on such evidence. The Court of Appeals granted a rehearing. On rehearing, the Court of Appeals withdrew its opinion in *McCulloch I* and concluded that trial counsel performed in a deficient manner by eliciting the only evidence of McCulloch's age. *State v. McCulloch*, 15 Neb. App. 616, 733 N.W.2d 586 (2007) (hereinafter *McCulloch II*).

In *McCulloch II*, the Court of Appeals referred to *State v. Lauritsen*, 199 Neb. 816, 261 N.W.2d 755 (1978), in which this court held that a jury may consider the defendant's physical appearance to determine his or her age if there is other circumstantial evidence to support an inference that the defendant is of sufficient age. The Court of Appeals again determined that McCulloch's physical appearance was open to view by the jury, because he was present in court and P.M. pointed him out during her testimony. However, the Court of Appeals concluded that the State had not adduced sufficient evidence in addition to physical appearance from which the jury could infer that McCulloch was at least 19 years old. The Court of Appeals noted that the only evidence adduced by the State arguably relevant to McCulloch's age was P.M.'s testimony that McCulloch was her uncle. The Court of Appeals contrasted this evidence to evidence in *Lauritsen* where the defendant had bought alcohol. The Court of Appeals noted that in *Lauritsen,* based on evidence that the defendant bought alcohol, a jury

could reasonably have inferred that the defendant was of legal age to buy alcohol and therefore was of sufficient age under the statute then at issue, Neb. Rev. Stat. § 28-408.03(1)(c) (Reissue 1975). In contrast, in the present case, the Court of Appeals determined that evidence that McCulloch was the 13-year-old victim's uncle did not give rise to a logical inference that he was necessarily at least 19 years old.

The Court of Appeals stated in *McCulloch II* that the State adduced no further circumstantial or other evidence of McCulloch's age and that the only other evidence from which the jury could have inferred that he was at least 19 was adduced by defense counsel. The Court of Appeals noted that during cross-examination of a witness in the State's case in chief, defense counsel elicited testimony that McCulloch had had a sexual relationship with P.M.'s mother 3 years prior to the incident with P.M. and that P.M.'s mother was older than 19 at the time of that relationship. Later in the trial during the case presented by McCulloch, defense counsel elicited testimony during the direct examination of McCulloch's sister that McCulloch was 6 years older than the witness and that the witness had children who were 12 and 13 years old at the time of trial. Because such evidence elicited by defense counsel was the only circumstantial evidence which, when combined with an observation of McCulloch's physical appearance, could have allowed the jury to determine that McCulloch was at least 19 years old, the Court of Appeals determined that defense counsel performed in a deficient manner. The Court of Appeals concluded that because such deficient performance prejudiced McCulloch, he had received ineffective assistance of counsel.

The Court of Appeals further concluded that "all the evidence presented by the State" was insufficient to support a conviction and that therefore, under *Lockhart v. Nelson*, 488 U.S. 33, 109 S. Ct. 285, 102 L. Ed. 2d 265 (1988), the Double Jeopardy Clause forbade retrial. *McCulloch II*, 15 Neb. App. at 623, 733 N.W.2d at 592. The Court of Appeals reversed McCulloch's conviction and remanded the cause with directions to dismiss.

We granted the State's petition for further review of *McCulloch II*.

ASSIGNMENT OF ERROR

On further review, the State asserts that the Court of Appeals erred in concluding that McCulloch received ineffective assistance of counsel.

STANDARD OF REVIEW

[1] On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *State v. Tompkins*, 272 Neb. 547, 723 N.W.2d 344 (2006).

ANALYSIS

The Record Is Not Sufficient for the Court of Appeals to Determine That McCulloch Received Ineffective Assistance of Counsel.

The State asserts on further review that the Court of Appeals erred in concluding that McCulloch received ineffective assistance of counsel. The State argues that the Court of Appeals' reasoning was based on a hindsight review of the trial and that the Court of Appeals' analysis presumes that in formulating trial strategy, defense counsel should have been required to assume that the State would fail to prove the age element of the crime. We conclude that the record on direct appeal was not sufficient to determine whether McCulloch received ineffective assistance of counsel and that therefore, the Court of Appeals erred in concluding that he did.

The Court of Appeals determined that McCulloch received ineffective assistance of counsel because defense counsel elicited the only evidence which, when combined with observation of his physical appearance, would have allowed the jury to determine that he was over 19 years old at the time of the incident with P.M. The Court of Appeals cited *State v. Lauritsen*, 199 Neb. 816, 261 N.W.2d 755 (1978). Under *Lauritsen*, the defendant's physical appearance alone is not sufficient to prove the defendant is of a certain age, but it may be considered as evidence of age when combined with other circumstantial evidence to support an inference that the defendant is of a sufficient age. The Court of Appeals noted that the circumstantial evidence in the present case included: (1) testimony presented

by the State that McCulloch was the 13-year-old victim's uncle; (2) testimony adduced by defense counsel on cross-examination during the State's case in chief that McCulloch had a sexual relationship with the victim's mother 3 years prior to the incident with the victim; and (3) testimony adduced by defense counsel during presentation of the defense's case that McCulloch was 6 years older than his sister and that the sister had children who were 12 and 13 years old at the time of trial. The Court of Appeals determined that the evidence presented by the State was not sufficient to support an inference that McCulloch was over 19 and that only the circumstantial evidence adduced by defense counsel was sufficient to support such an inference. The Court of Appeals therefore concluded, based on the record on direct appeal, that defense counsel's performance was deficient.

The Court of Appeals was correct to note that under *Lauritsen*, McCulloch's physical appearance alone was not sufficient to prove his age. We note that the evidence of age required under *Lauritsen* in addition to physical appearance need not be conclusive direct evidence of age, but, rather, may be circumstantial evidence from which a jury might reasonably infer that the defendant is of a sufficient age.

It is not necessary to our resolution of this case to decide whether the Court of Appeals was correct in its determinations that the State's evidence was not sufficient circumstantial evidence to support an inference of McCulloch's age and that the only sufficient circumstantial evidence to support an inference that McCulloch was over 19 was the testimony elicited by defense counsel. For purposes of analysis, we assume that the Court of Appeals was correct in its determination that the State's evidence was not sufficient to prove McCulloch's age and that such element was proved with the addition of circumstantial evidence adduced by defense counsel.

[2,3] A claim of ineffective assistance of counsel need not be dismissed merely because it is made on direct appeal. The determining factor is whether the record is sufficient to adequately review the question. *State v. Walker*, 272 Neb. 725, 724 N.W.2d 552 (2006). If a matter has not been raised or ruled on

at the trial level and requires an evidentiary hearing, an appellate court will not address the matter on direct appeal. *Id.*

The alleged ineffectiveness of counsel in this case was not raised or ruled on at the trial level. We determine that in this case, an evaluation of defense counsel's actions would require an evaluation of trial strategy and of matters not contained in the record. Although the record on appeal shows that defense counsel elicited the arguably strongest circumstantial evidence regarding McCulloch's age during the defense's case, it does not indicate the reason defense counsel elicited such evidence and it does not appear that counsel presented such evidence in a deliberate attempt to establish McCulloch's age. Defense counsel may have had other, reasonable strategic reasons for presenting such evidence.

In this regard, the State argues that defense counsel had a reasonable strategy which included presenting evidence regarding McCulloch's sexual relationship with P.M.'s mother, which relationship might have given P.M. a motive to lie about the sexual assault. The State also notes that McCulloch moved for a directed verdict at the close of the State's case. The State argues that after the motion for directed verdict was denied, defense counsel had the option to decline to present a defense and rely on the State's purported failure to prove McCulloch's age. Instead, defense counsel made a reasonable strategic choice to present a full defense which included the testimony of McCulloch's sister. McCulloch argues in response that the State mischaracterizes trial counsel's defense strategy and that even if counsel had a reasonable defense strategy, as the State claimed, there was no reason for counsel to elicit evidence regarding the relative ages of McCulloch and his sister.

We do not, and cannot, determine on direct appeal whether defense counsel elicited the evidence at issue pursuant to a reasonable defense strategy because there has been no evidentiary hearing to present evidence regarding defense counsel's strategy or lack thereof. While in hindsight it appears that defense counsel may have helped the State prove an element that the State may have failed to adequately prove, without an evidentiary hearing to explore defense counsel's strategy, we cannot determine based solely on the record on direct appeal

that defense counsel's performance was deficient. Such a determination would require consideration of whether defense counsel's actions were reasonable in the context of the trial.

We conclude that the record on appeal is not sufficient to review McCulloch's claim of ineffective assistance of counsel and that therefore, the Court of Appeals erred in concluding in this direct appeal that McCulloch received ineffective assistance of counsel. We therefore reverse the decision of the Court of Appeals in *McCulloch II* and remand the cause to the Court of Appeals with directions to affirm McCulloch's conviction.

The Court of Appeals Misapplied the Lockhart *Standard.*

Because we conclude that McCulloch's conviction should be affirmed, we need not consider whether a retrial would violate the Double Jeopardy Clause. However, we take this opportunity to comment on the Court of Appeals' resolution of the Double Jeopardy issue.

After the Court of Appeals determined in *McCulloch II* that McCulloch's conviction should be reversed because of ineffective assistance of counsel, the Court of Appeals considered whether the cause should be remanded for a new trial or whether the Double Jeopardy Clause barred retrial. In considering the Double Jeopardy issue, the Court of Appeals cited *Lockhart v. Nelson*, 488 U.S. 33, 109 S. Ct. 285, 102 L. Ed. 2d 265 (1988), for the proposition that "the Double Jeopardy Clause does not forbid retrial so long as the sum of the evidence offered *by the state* and admitted by the trial court, whether erroneously or not, would have been sufficient to sustain a guilty verdict." *McCulloch II*, 15 Neb. App. at 622, 733 N.W.2d at 591 (emphasis in original). The Court of Appeals read *Lockhart* to provide that only evidence offered by the State should be considered in determining whether there was sufficient evidence to sustain a guilty verdict. The Court of Appeals determined that although there was sufficient evidence to sustain the conviction in the present case if all the evidence, including evidence presented by the defense, was considered, there was not sufficient evidence if only the evidence presented by the State was considered. Based on its reading of *Lockhart*, the Court of Appeals concluded that the Double Jeopardy Clause prohibited the State

from retrying McCulloch. As discussed below, because a proper *Lockhart* analysis considers all the evidence admitted at trial, not just that offered by the State, the reasoning of the Court of Appeals, although understandable, was flawed.

We acknowledge that in a line of cases beginning with *State v. Anderson*, 258 Neb. 627, 605 N.W.2d 124 (2000), this court has sometimes stated, referring to *Lockhart*, that the Double Jeopardy Clause does not forbid a retrial so long as the sum of the evidence offered by the State and admitted by a trial court, whether erroneously or not, would have been sufficient to sustain a guilty verdict. We also note that in the introductory paragraph of *Lockhart*, the U.S. Supreme Court stated, "where the evidence offered by the State and admitted by the trial court — whether erroneously or not — would have been sufficient to sustain a guilty verdict, the Double Jeopardy Clause does not preclude retrial." 488 U.S. at 34. However, a reading of the entire *Lockhart* opinion indicates that the Court did not intend to limit Double Jeopardy analysis to a consideration of only the evidence offered by the State. In *Lockhart*, the Court stated that "a reviewing court must consider all of the evidence admitted by the trial court in deciding whether retrial is permissible under the Double Jeopardy Clause." 488 U.S. at 41. The Court analogized the Double Jeopardy analysis to consideration of a motion for judgment of acquittal at the close of all the evidence and noted that a "trial court in passing on such a motion considers all of the evidence it has admitted, and to make the analogy complete it must be this same quantum of evidence that is considered by the reviewing court." 488 U.S. at 41-42.

Although the specific issue in *Lockhart* was whether erroneously admitted evidence should be considered and not whether evidence presented by the defense should be considered, a correct reading of *Lockhart* indicates that all evidence admitted by the trial court, including evidence offered by the defense, should be considered in determining whether there was sufficient evidence to permit retrial. This reading is consistent with the reading of *Lockhart* this court made in *State v. Palmer*, 257 Neb. 702, 600 N.W.2d 756 (1999), wherein we stated that in our evaluation of the sufficiency of the evidence, we consider all of

the evidence admitted at the trial to determine whether there was sufficient evidence to sustain the conviction.

[4] We have referred to "evidence offered by the State and admitted by the court" in *Anderson, supra*, and in other cases including *State v. Morrow*, 273 Neb. 592, 731 N.W.2d 558 (2007), *State v. Floyd*, 272 Neb. 898, 725 N.W.2d 817 (2007), *State v. Barfield*, 272 Neb. 502, 723 N.W.2d 303 (2006), *State v. Beeder*, 270 Neb. 799, 707 N.W.2d 790 (2006), *State v. Allen*, 269 Neb. 69, 690 N.W.2d 582 (2005), *State v. Faust*, 265 Neb. 845, 660 N.W.2d 844 (2003), *State v. Haltom*, 263 Neb. 767, 642 N.W.2d 807 (2002), and *State v. Sheets*, 260 Neb. 325, 618 N.W.2d 117 (2000). To the extent such cases may be read as limiting Double Jeopardy consideration to only evidence offered by the State, they are disapproved. Instead, the proper standard is as follows: The Double Jeopardy Clause does not forbid a retrial so long as the sum of all the evidence admitted by a trial court, whether erroneously or not, would have been sufficient to sustain a guilty verdict.

CONCLUSION

On further review of *McCulloch II*, we conclude that the record in this direct appeal was not sufficient to determine whether McCulloch received ineffective assistance of counsel and that therefore, the Court of Appeals erred in determining that he had received ineffective assistance of counsel at trial. We reverse the decision of the Court of Appeals in *McCulloch II* and remand the cause to the Court of Appeals with directions to affirm McCulloch's conviction and sentence.

REVERSED AND REMANDED WITH DIRECTIONS.

S.L., A MINOR, BY HER NEXT FRIEND, GUARDIAN AND MOTHER, SUSAN L., APPELLANT, V. STEVEN L., APPELLEE.

742 N.W.2d 734

Filed December 14, 2007. No. S-06-563.

1. **Judgments: Appeal and Error.** When a jurisdictional question does not involve a factual dispute, the issue is a matter of law. An appellate court reviews questions of law independently of the lower court's conclusion.
2. **Jurisdiction: Rules of the Supreme Court: Pleadings: Appeal and Error.** When reviewing an order dismissing a party from a case for lack of personal jurisdiction under Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(2) (rev. 2003), an appellate court examines the question of whether the nonmoving party has established a prima facie case of personal jurisdiction de novo.
3. **Jurisdiction: Judgments: Appeal and Error.** An appellate court reviews a lower court's determination regarding personal jurisdiction based on written submissions in the light most favorable to the nonmoving party.
4. **Pleadings: Affidavits: Appeal and Error.** If the lower court does not hold a hearing and instead relies on the pleadings and affidavits, then an appellate court must look at the facts in the light most favorable to the nonmoving party and resolve all factual conflicts in favor of that party.
5. **Jurisdiction: Words and Phrases.** Personal jurisdiction is the power of a tribunal to subject and bind a particular entity to its decisions.
6. **Due Process: Jurisdiction: States.** Before a court can exercise personal jurisdiction over a nonresident defendant, the court must determine, first, whether the long-arm statute is satisfied and, if the long-arm statute is satisfied, second, whether minimum contacts exist between the defendant and the forum state for personal jurisdiction over the defendant without offending due process.
7. **Constitutional Law: Jurisdiction: States.** Nebraska's long-arm statute, Neb. Rev. Stat. § 25-536 (Reissue 1995), extends Nebraska's jurisdiction over nonresidents having any contact with or maintaining any relation to this state as far as the U.S. Constitution permits.
8. **Due Process: Jurisdiction: States: Appeal and Error.** In analyzing personal jurisdiction, an appellate court considers the quality and type of the defendant's activities to decide whether the defendant has the necessary minimum contacts with the forum state to satisfy due process.
9. **Due Process: Jurisdiction: States.** Due process for personal jurisdiction over a nonresident defendant requires that a defendant's minimum contacts with the forum state be such that maintenance of the suit does not offend traditional notions of fair play and substantial justice.
10. **Jurisdiction: States.** Two types of personal jurisdiction may be exercised depending upon the facts and circumstances of the case: general personal jurisdiction or specific personal jurisdiction. In the exercise of general personal jurisdiction, the plaintiff's claim does not have to arise directly out of the defendant's contacts

with the forum state, if the defendant has engaged in "continuous and systematic general business contacts" with the forum state.

11. ____: ____. If the defendant's contacts are neither substantial nor continuous and systematic, but the cause of action arises out of or is related to the defendant's contact with the forum, a court may assert "specific jurisdiction" over the defendant, depending on the quality and nature of such contact.
12. **Due Process: Jurisdiction: States.** The benchmark for determining whether the exercise of personal jurisdiction satisfies due process is whether the defendant's minimum contacts with the forum state are such that the defendant should reasonably anticipate being haled into court there.
13. **Jurisdiction: States.** Whether a forum state court has personal jurisdiction over a nonresident defendant depends on whether the defendant has acted in a manner which creates substantial connections with the forum state, resulting in the defendant's purposeful availment of the benefits and protections of the law of the forum state.
14. ____: ____. The purposeful availment requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts, or of the unilateral activity of another party or a third person. Jurisdiction is proper, however, where the contacts proximately result from actions by the defendant himself that create a substantial connection with the forum state.
15. **Sexual Assault: Intent.** An intent to inflict injury can be inferred as a matter of law in cases of sexual abuse.
16. **Due Process: Jurisdiction: States.** Due process requires that individuals have fair warning that their conduct may subject them to the jurisdiction of a state in which they do not reside. Where a forum seeks to assert specific jurisdiction over an out-of-state defendant who has not consented to suit there, this fair warning requirement is satisfied if the defendant has purposefully directed his activities at residents of the forum and the litigation results from alleged injuries that arise out of or relate to those activities.
17. **Jurisdiction: States.** Once it has been decided that a defendant purposefully established minimum contacts within the forum state, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with fair play and substantial justice.
18. **Jurisdiction: States: Proof.** When weighing the facts to determine whether the exercise of personal jurisdiction would comport with fair play and substantial justice, a court may consider (1) the burden on the defendant, (2) the forum state's interest in adjudicating the dispute, (3) the plaintiff's interest in obtaining convenient and effective relief, (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and (5) the shared interest of the several states in furthering fundamental substantive social policies. Such considerations sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required.
19. **Jurisdiction: States.** A state generally has a manifest interest in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors.

Appeal from the District Court for Lancaster County: PAUL D. MERRITT, JR., Judge. Reversed and remanded for further proceedings.

Joel Bacon, of Keating, O'Gara, Nedved & Peter, P.C., L.L.O., and Richard Ducote for appellant.

Elise Meerkatz and Christopher A. Furches, of Johnson, Flodman, Guenzel & Widger, for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

STEPHAN, J.

In *Susan L. v. Steven L.*,[1] we held that pursuant to the Uniform Custody Jurisdiction and Enforcement Act, Neb. Rev. Stat. §§ 43-1226 to 43-1266 (Reissue 2004), Canadian courts had exclusive continuing jurisdiction over a custody dispute between Steven L., a resident and citizen of Canada, and Susan L., who resides with the parties' minor daughter, S.L., in Nebraska. The same parties are before us in this appeal from the dismissal of an intentional tort action filed in the district court for Lancaster County by Susan, on S.L.'s behalf, against Steven. Susan alleged that on multiple occasions, Steven transported S.L. from Nebraska to Canada for court-ordered visitation, during which visitation he intentionally abused her, and that such abuse resulted in injuries for which S.L. is entitled to recover compensatory damages. The question presented in this appeal is whether the district court erred in dismissing the action on the ground that it lacked personal jurisdiction over Steven.

BACKGROUND

PARTIES

S.L. was born in Canada on March 19, 1998, to Susan and Steven, who both resided in Canada at the time. On October 18, 2000, the Supreme Court of British Columbia, Vancouver, Canada, issued an "Interim Order" awarding custody of S.L.

[1] *Susan L. v. Steven L.*, 273 Neb. 24, 729 N.W.2d 35 (2007).

to Susan and providing parenting time to Steven. The order contemplated that Susan and S.L. would relocate to Nebraska, which they did in October 2000. S.L. has resided in Nebraska since moving here with Susan, except for visits with Steven in Canada for the court-ordered parenting time.

Steven is a permanent resident of British Columbia and has never resided, owned property, or conducted any type of business in Nebraska. Since October 2000, he has traveled to Nebraska 12 to 14 times to pick up S.L. and transport her to British Columbia for court-ordered parenting time. In November 2004, a British Columbia court entered an order preventing Steven from transporting S.L., but the court did not suspend his visitation rights. After that order was entered, Steven's mother traveled to Nebraska to transport S.L. to British Columbia for two visits with Steven. The British Columbia court retains jurisdiction in the ongoing custody and visitation dispute between Susan and Steven.

District Court Proceedings

Acting as the next friend, guardian, and mother of S.L., Susan commenced this action against Steven in the district court for Lancaster County. In the complaint, Susan alleged that Steven committed repeated acts of battery and sexual abuse against S.L. during five visits in British Columbia from 2003 through 2005. Susan further alleged that in an effort to coerce silence or recantation, Steven withheld food from S.L. for long periods of time and threatened to prevent any future contact with Susan and other family members.

The complaint was served on Steven in British Columbia. In response, he filed a motion to dismiss pursuant to Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(2) (rev. 2003) on the ground that the Nebraska court lacked jurisdiction over his person. The motion was submitted on the pleadings, as well as affidavits and exhibits submitted by the parties and received by the court. No oral testimony was heard.

The district court determined that it did not have personal jurisdiction over Steven and granted his motion to dismiss. The court noted that Steven's limited contacts with Nebraska for the purposes of transporting S.L. for court-ordered visitation were

insufficient to subject him to the jurisdiction of Nebraska courts. The court also found that Canada, not Nebraska, was the focal point of the harm alleged and that there was no showing Steven foresaw or reasonably should have foreseen that his alleged conduct in Canada would have any effect in Nebraska. Susan moved to alter or amend the order of dismissal, which was denied by the district court. Susan then filed this timely appeal, and we granted her petition to bypass.[2]

ASSIGNMENTS OF ERROR

Susan assigns that the district court erred (1) in concluding that Nebraska lacked personal jurisdiction over Steven and (2) in failing to give S.L. the benefit of all reasonable inferences deducible from the pleadings and affidavits.

STANDARD OF REVIEW

[1-4] When a jurisdictional question does not involve a factual dispute, the issue is a matter of law. An appellate court reviews questions of law independently of the lower court's conclusion.[3] When reviewing an order dismissing a party from a case for lack of personal jurisdiction under rule 12(b)(2), an appellate court examines the question of whether the nonmoving party has established a prima facie case of personal jurisdiction de novo.[4] An appellate court reviews a lower court's determination regarding personal jurisdiction based on written submissions in the light most favorable to the nonmoving party.[5] If the lower court does not hold a hearing and instead relies on the pleadings and affidavits, then an appellate court must look at the facts in

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[2] See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

[3] *Erickson v. U-Haul Internat., ante* p. 236, 738 N.W.2d 453 (2007); *Brunkhardt v. Mountain West Farm Bureau Mut. Ins.*, 269 Neb. 222, 691 N.W.2d 147 (2005).

[4] *Ameritas Invest. Corp. v. McKinney*, 269 Neb. 564, 694 N.W.2d 191 (2005). See, *Stanton v. St. Jude Medical, Inc.*, 340 F.3d 690 (8th Cir. 2003); *Epps v. Stewart Information Services Corp.*, 327 F.3d 642 (8th Cir. 2003).

[5] *Ameritas Invest. Corp. v. McKinney, supra* note 4. See *Stanton v. St. Jude Medical, Inc., supra* note 4.

the light most favorable to the nonmoving party and resolve all factual conflicts in favor of that party.[6]

ANALYSIS

[5,6] Personal jurisdiction is the power of a tribunal to subject and bind a particular entity to its decisions.[7] Before a court can exercise personal jurisdiction over a nonresident defendant, the court must determine, first, whether the long-arm statute is satisfied and, if the long-arm statute is satisfied, second, whether minimum contacts exist between the defendant and the forum state for personal jurisdiction over the defendant without offending due process.[8]

Long-Arm Statute

[7] Nebraska's long-arm statute, Neb. Rev. Stat. § 25-536 (Reissue 1995), extends Nebraska's jurisdiction over nonresidents having any contact with or maintaining any relation to this state as far as the U.S. Constitution permits.[9] Thus, we need only consider whether a Nebraska court's exercise of jurisdiction over Steven would be consistent with due process.

Minimum Contacts

[8-11] In analyzing personal jurisdiction, we consider the quality and type of the defendant's activities to decide whether the defendant has the necessary minimum contacts with the forum state to satisfy due process.[10] In this context, due process requires that a defendant's minimum contacts with the forum state be such that "'maintenance of the suit does not offend

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[6] *Ameritas Invest. Corp. v. McKinney, supra* note 4. See *Epps v. Stewart Information Services Corp., supra* note 4.

[7] *In re Petition of SID No. 1*, 270 Neb. 856, 708 N.W.2d 809 (2006); *Diversified Telecom Servs. v. Clevinger*, 268 Neb. 388, 683 N.W.2d 338 (2004).

[8] *Brunkhardt v. Mountain West Farm Bureau Mut. Ins., supra* note 3.

[9] *Erickson v. U-Haul Internat., supra* note 3; *Brunkhardt v. Mountain West Farm Bureau Mut. Ins., supra* note 3.

[10] *Erickson v. U-Haul Internat., supra* note 3.

"traditional notions of fair play and substantial justice."'"[11] Two types of personal jurisdiction may be exercised depending upon the facts and circumstances of the case: general personal jurisdiction or specific personal jurisdiction.[12] In the exercise of general personal jurisdiction, the plaintiff's claim does not have to arise directly out of the defendant's contacts with the forum state, if the defendant has engaged in "'"continuous and systematic general business contacts"'" with the forum state.[13] If the defendant's contacts are neither substantial nor continuous and systematic, but the cause of action arises out of or is related to the defendant's contact with the forum, a court may assert specific jurisdiction over the defendant, depending on the quality and nature of such contact.[14] In this case, there is no allegation that Steven had substantial, continuous, or systematic contacts with Nebraska. Rather, Susan alleged that Steven came into the state on several occasions for the specific purpose of transporting S.L. to Canada for court-ordered visitation, during which visitation he committed intentional acts of abuse. We must determine whether these specific acts by Steven establish the necessary minimum contacts which would permit a Nebraska court to exercise jurisdiction over his person without violating his right to due process.[15]

[12-14] The benchmark for determining whether the exercise of personal jurisdiction satisfies due process is whether the defendant's minimum contacts with the forum state are such that the defendant should reasonably anticipate being haled

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[11] *Quality Pork Internat. v. Rupari Food Servs.*, 267 Neb. 474, 481, 675 N.W.2d 642, 649 (2004), quoting *Internat. Shoe Co. v. Washington*, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945).

[12] *Brunkhardt v. Mountain West Farm Bureau Mut. Ins., supra* note 3.

[13] *Brunkhardt v. Mountain West Farm Bureau Mut. Ins., supra* note 3, 269 Neb. at 226, 691 N.W.2d at 152, quoting *Quality Pork Internat. v. Rupari Food Servs., supra* note 11. Accord *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 104 S. Ct. 1868, 80 L. Ed. 2d 404 (1984).

[14] *Brunkhardt v. Mountain West Farm Bureau Mut. Ins., supra* note 3; *Quality Pork Internat. v. Rupari Food Servs., supra* note 11.

[15] See, *Brunkhardt v. Mountain West Farm Bureau Mut. Ins., supra* note 3; *Diversified Telecom Servs. v. Clevinger, supra* note 7.

into court there.[16] Whether a forum state court has personal jurisdiction over a nonresident defendant depends on whether the defendant has acted in a manner which creates substantial connections with the forum state, resulting in the defendant's purposeful availment of the benefits and protections of the law of the forum state.[17] The "'purposeful availment'" requirement "ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts . . . or of the 'unilateral activity of another party or a third person.'"[18] "Jurisdiction is proper, however, where the contacts proximately result from actions by the defendant *himself* that create a 'substantial connection' with the forum State."[19]

Applying the principle that personal jurisdiction cannot be premised on the unilateral activity of another, several courts have held that a noncustodial parent's exercise of visitation rights or other routine communication with children in a state to which the custodial parent has relocated is not a sufficient contact with that state to subject the noncustodial parent to the jurisdiction of its courts. For example, in *Miller v. Kite*,[20] the custodial parent moved to North Carolina after the parties' divorce and commenced an action there to modify a child support award. The noncustodial parent, who was domiciled in California and resided in Japan, had never resided in North Carolina. The North Carolina Supreme Court held that neither the child's presence in that state nor the noncustodial parent's periodic exercise of his visitation rights and mailing of child support payments there provided the constitutionally required minimum contacts to justify in personam jurisdiction over the noncustodial parent. The court noted that the child's presence

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[16] *Ameritas Invest. Corp. v. McKinney, supra* note 4; *Brunkhardt v. Mountain West Farm Bureau Mut. Ins., supra* note 3.

[17] *Brunkhardt v. Mountain West Farm Bureau Mut. Ins., supra* note 3. See *Diversified Telecom Servs. v. Clevinger, supra* note 7.

[18] *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985) (citations omitted). See, also, *Quality Pork Internat. v. Rupari Food Servs., supra* note 11.

[19] *Burger King Corp. v. Rudzewicz, supra* note 18, 471 U.S. at 475.

[20] *Miller v. Kite*, 313 N.C. 474, 329 S.E.2d 663 (1985).

in North Carolina was solely the result of the custodial parent's decision to reside there and that the visitations were temporary and unrelated to the action. Similarly, in *In re Marriage of Bushelman v. Bushelman*,[21] the Wisconsin Court of Appeals held that a noncustodial parent's acquiescence in his children's residence in Wisconsin with the custodial parent, and his letters, telephone calls, and visits with the children in that state, did not satisfy the minimum contacts requirement which would permit a Wisconsin court to exercise personal jurisdiction over him in a divorce proceeding.

Both *Miller* and *In re Marriage of Bushelman* rely in part on the reasoning of *Kulko v. California Superior Court*.[22] In that case, the parties resided with their children in New York until they separated. Their separation agreement provided that their children would reside with the father in New York during the school year, but would spend vacation periods with the mother, who moved to California. One of the children later expressed a desire to live with her mother in California, and the father acquiesced. The other child moved to California without the father's prior knowledge or acquiescence, and the mother then commenced a proceeding in California to modify custody and support obligations which had been in effect under the separation agreement. In reversing a decision of the California Supreme Court's affirmance of a lower court's finding that it had personal jurisdiction over the father, the U.S. Supreme Court noted that there was no claim that the father had "visited physical injury on either property or persons within the State of California" and that the single act of the father's acquiescence in the stated preference of one of his children to reside in California with her mother afforded "no basis on which it can be said that [the father] could reasonably have anticipated being 'haled before a [California] court.'"[23]

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[21] *In re Marriage of Bushelman v. Bushelman*, 246 Wis. 2d 317, 629 N.W.2d 795 (Wis. App. 2001).

[22] *Kulko v. California Superior Court*, 436 U.S. 84, 98 S. Ct. 1690, 56 L. Ed. 2d 132 (1978).

[23] *Id.*, 436 U.S. at 96-98, citing and quoting *Shaffer v. Heitner*, 433 U.S. 186, 97 S. Ct. 2569, 53 L. Ed. 2d 683 (1977).

In this case, however, Steven's contacts with Nebraska are alleged to involve something much different than the lawful exercise of visitation rights. Susan alleges that during five of these visitations, including three when Steven personally transported S.L. between Nebraska and British Columbia and two when he directed his mother to do so, Steven committed repeated intentional acts of abuse while S.L. was with him in Canada. Although Steven states in his affidavit that the allegations of abuse have been fully investigated in Canada, he does not disclose the results of those investigations, nor does he specifically deny the conduct alleged by Susan. Viewing the allegations of the complaint and the factual statements contained in the parties' affidavits in a light most favorable to Susan in her capacity as next friend, guardian, and mother of S.L., as our standard of review requires, the question is whether a nonresident who repeatedly transports a child residing in Nebraska to another jurisdiction where he commits intentional acts of abuse before returning the child to Nebraska could reasonably expect to be required to defend an intentional tort action brought on the child's behalf in a Nebraska court.

In *Calder v. Jones*,[24] the U.S. Supreme Court addressed an analogous issue involving an intentional tort allegedly committed by residents of one state against a resident of another. In that case, two Florida residents participated in the publication of an article about a California resident, who brought a libel action in California. One of the Florida defendants, a reporter, researched the article through telephone conversations with sources in California and made several business trips to that state. The other Florida defendant, who was the president and editor of the publication, had traveled to California on two occasions, both unrelated to the article in question. Both defendants asserted that as Florida residents, they were not subject to the jurisdiction of the California court in which the libel action was filed. Rejecting their contention, the Court noted that the defendants were "not charged with mere untargeted negligence. Rather, their intentional, and allegedly tortious, actions were expressly

[24] *Calder v. Jones*, 465 U.S. 783, 104 S. Ct. 1482, 79 L. Ed. 2d 804 (1984).

aimed at California."[25] The Court held that the defendants were "primary participants in an alleged wrongdoing intentionally directed at a California resident, and jurisdiction over them is proper on that basis."[26]

Employing slightly different reasoning, the court in *Hughs on Behalf of Praul v. Cole*[27] held that a Minnesota court could exercise personal jurisdiction over a noncustodial parent residing in Pennsylvania who had allegedly abused the child, a Minnesota resident, during summer visitations in Pennsylvania. The noncustodial parent had never resided in or visited Minnesota. The court reasoned that while his contacts with the state were not numerous, they were significant in that they included a continuing relationship with the child and repeated telephone calls to the home in Minnesota where the child resided with his mother. The court further noted that the noncustodial parent could reasonably foresee that consequences from the abuse could arise in Minnesota, which had a strong interest in enabling the custodial parent's efforts to protect her child from abuse by seeking a protective order against the noncustodial parent.

[15,16] Based upon Susan's allegations and affidavit, which we must accept as true for purposes of the jurisdictional issue before us, we conclude that Steven's contacts with Nebraska are sufficient to subject him to specific personal jurisdiction of a Nebraska court. The record supports an inference that Steven's undisputed travels to Nebraska for the purpose of transporting S.L. to and from British Columbia were an integral part of the intentional abuse alleged by Susan to have occurred there. As such, Steven's presence in Nebraska would not be random, fortuitous, or attenuated, but, rather, would constitute a means to facilitate intentional harm inflicted upon a Nebraska resident after she was physically removed from the state and before she was returned. An intent to inflict injury can be inferred as a matter of law in cases of sexual abuse,[28] and thus, any abuse

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[25] *Id.*, 465 U.S. at 789.

[26] *Id.*, 465 U.S. at 790.

[27] *Hughs on Behalf of Praul v. Cole*, 572 N.W.2d 747 (Minn. App. 1997).

[28] *State Farm Fire & Cas. Co. v. van Gorder*, 235 Neb. 355, 455 N.W.2d 543 (1990).

inflicted upon S.L. in Canada would have foreseeable consequences on the child when she was returned to Nebraska. There are also allegations that during at least some of the visitations, Steven made threats intended to prevent S.L. from reporting the abuse to Susan and Nebraska authorities. It is not simply Steven's presence in Nebraska to exercise visitation rights with a Nebraska resident, but, rather, the alleged intentional misuse of such rights as a means of inflicting intentional harm upon S.L., as alleged by Susan, which constitutes the "substantial connection" between Steven and Nebraska. Due process requires that individuals have "'fair warning'" that their conduct may subject them to the jurisdiction of a state in which they do not reside.[29]

> Where a forum seeks to assert specific jurisdiction over an out-of-state defendant who has not consented to suit there, this "fair warning" requirement is satisfied if the defendant has "purposefully directed" his activities at residents of the forum . . . and the litigation results from alleged injuries that "arise out of or relate to" those activities.[30]

We conclude that one who removes a minor child from her Nebraska home under the guise of exercising a visitation right in another jurisdiction, and then intentionally subjects the child to harm before returning her to this state, could reasonably expect to be haled into a Nebraska court to answer for such conduct in a civil action brought on behalf of the child.

Fair Play and Substantial Justice

[17,18] Once it has been decided that a defendant purposefully established minimum contacts within the forum state, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would

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[29] See, *Burger King Corp. v. Rudzewicz, supra* note 18, 471 U.S. at 472. Accord, *Shaffer v. Heitner, supra* note 23 (Stevens, J., concurring in judgment); *Quality Pork Internat. v. Rupari Food Servs., supra* note 11.

[30] *Burger King Corp. v. Rudzewicz, supra* note 18, 471 U.S. at 472 (citations omitted).

comport with fair play and substantial justice.[31] These considerations include (1) the burden on the defendant, (2) the forum state's interest in adjudicating the dispute, (3) the plaintiff's interest in obtaining convenient and effective relief, (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and (5) the shared interest of the several states in furthering fundamental substantive social policies.[32] Such considerations sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required.[33]

The fact that Steven is a resident of Canada is an important factor to be considered in this analysis. The U.S. Supreme Court has stated that "[t]he unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders."[34]

However, the record reflects that Steven has previously participated in Nebraska legal proceedings involving S.L. by requesting the district court for Lancaster County to enforce certain orders entered by a Canadian court. Traveling from his home in Canada to Nebraska for court proceedings should be no more burdensome to Steven than the same journey to exercise visitation rights. Although Steven claims that there are witnesses in Canada upon whose testimony he would rely, there is no showing that he could not preserve their testimony for presentation in a Nebraska court. The record reflects that one such witness, Steven's mother, has previously testified

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[31] *Burger King Corp. v. Rudzewicz, supra* note 18; *Internat. Shoe Co. v. Washington, supra* note 11; *Diversified Telecom Servs. v. Clevinger, supra* note 7.

[32] *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 107 S. Ct. 1026, 94 L. Ed. 2d 92 (1987); *Burger King Corp. v. Rudzewicz, supra* note 18; *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980); *Diversified Telecom Servs. v. Clevinger, supra* note 7.

[33] See, *Burger King Corp. v. Rudzewicz, supra* note 18; *Diversified Telecom Servs. v. Clevinger, supra* note 7.

[34] *Asahi Metal Industry Co. v. Superior Court, supra* note 32, 480 U.S. at 114.

on his behalf in a Nebraska proceeding involving S.L. Other witnesses, including law enforcement personnel and medical professionals who would testify on behalf of S.L., are located in Nebraska.

[19] Nebraska has a significant interest in adjudicating the dispute, inasmuch as a state "generally has a 'manifest interest' in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors."[35] And the interest of the minor child in obtaining convenient and effective relief is better served in Nebraska, where she resides, than in Canada. Although Canada has an interest in a fair and efficient resolution of the controversy, its interest does not outweigh that of Nebraska.

Considering all relevant factors, we conclude that Nebraska's exercise of specific personal jurisdiction over Steven in this action would not offend notions of fair play and substantial justice.

CONCLUSION

Based upon our independent review of the complaint and affidavits, viewed in a light most favorable to Susan in her representative capacity as the next friend, guardian, and mother of S.L., we conclude that the district court for Lancaster County has specific personal jurisdiction over Steven and that it erred in granting his motion to dismiss. Accordingly, we reverse the order of dismissal and remand the cause for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

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[35] *Burger King Corp. v. Rudzewicz, supra* note 18, 471 U.S. at 473.

STATE OF NEBRASKA, APPELLEE, V. ERIC T. MCGHEE, APPELLANT.

742 N.W.2d 497

Filed December 14, 2007. No. S-06-1332.

1. **Convictions: Evidence: Appeal and Error.** Regardless of whether the evidence is direct, circumstantial, or a combination thereof, and regardless of whether the issue is labeled as a failure to direct a verdict, insufficiency of the evidence, or failure to prove a prima facie case, the standard is the same: In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support the conviction.
2. **Verdicts: Insanity: Appeal and Error.** The verdict of the finder of fact on the issue of insanity will not be disturbed unless there is insufficient evidence to support such a finding.
3. **Homicide: Intent.** The elements of first degree murder are listed in Neb. Rev. Stat. § 28-303 (Cum. Supp. 2006), which states that a person commits murder in the first degree if he or she kills another person purposely and with deliberate and premeditated malice.
4. **Intent: Words and Phrases.** Deliberate means not suddenly, not rashly, and requires that the defendant considered the probable consequences of his or her act before doing the act.
5. ____: ____. The term "premeditated" means to have formed a design to commit an act before it is done.
6. **Homicide: Intent: Words and Phrases.** One kills with premeditated malice if, before the act causing the death occurs, one has formed the intent or determined to kill the victim without legal justification.
7. **Homicide: Intent: Time.** No particular length of time for premeditation is required, provided that the intent to kill is formed before the act is committed and not simultaneously with the act that caused the death.
8. ____: ____: ____. The time required to establish premeditation may be of the shortest possible duration and may be so short that it is instantaneous, and the design or purpose to kill may be formed upon premeditation and deliberation at any moment before the homicide is committed.
9. **Homicide: Intent: Juries.** A question of premeditation is for the jury to decide.
10. **Criminal Law: Mental Competency.** The test of responsibility for crime is a defendant's capacity to understand the nature of the act alleged to be criminal and the ability to distinguish between right and wrong with respect to the act.
11. **Criminal Law: Insanity: Time.** For an insanity defense, the insanity must be in existence at the time of the alleged criminal act.
12. **Insanity: Proof.** A defendant who pleads that he or she is not responsible by reason of insanity has the burden to prove the defense by a preponderance of the evidence.

13. **Trial: Appeal and Error.** An appellate court does not resolve conflicts in evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence presented, which are within a fact finder's province for disposition.

Appeal from the District Court for Douglas County: SANDRA L. DOUGHERTY, Judge. Affirmed.

Thomas C. Riley, Douglas County Public Defender, and Timothy P. Burns for appellant.

Jon Bruning, Attorney General, and James D. Smith for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, McCORMACK, and MILLER-LERMAN, JJ.

HEAVICAN, C.J.

INTRODUCTION

Eric T. McGhee was convicted of first degree murder and use of a weapon to commit a felony. On appeal, McGhee contends there was insufficient evidence to support a conviction for first degree murder and that he was not responsible by reason of insanity.

FACTS

Procedural Background.

On March 11, 2003, McGhee was charged with first degree murder and use of a weapon to commit a felony in the death of Ezra Lowry. That same day, McGhee's counsel filed a motion to determine competency. Following a mental competency evaluation at the Lincoln Regional Center, McGhee was found not competent to stand trial. Periodic reviews were held with regard to McGhee's status, and on February 10, 2006, the court found that McGhee's competency had returned. On May 15, McGhee notified the court that he intended to plead not responsible by reason of insanity.

A jury trial was held from August 14 to 17, 2006. At trial, McGhee did not contest that he shot Lowry; rather, his theory of defense was that his actions did not amount to first degree

murder. Thus, McGhee contended that a conviction for second degree murder would be more appropriate and that in any case, he was not responsible by reason of insanity. The jury rejected these claims and found McGhee guilty of first degree murder and use of a weapon to commit a felony. On October 25, the district court denied McGhee's motion for a new trial and sentenced him to life imprisonment for first degree murder and 5 to 10 years' imprisonment for use of a weapon to commit a felony.

Events of January 29 and 30, 2003.

The events surrounding Lowry's death were presented primarily through the testimony of Jermaine Dunn and Nadeena Washington. McGhee, Dunn, Lowry, and Washington were good friends who frequently socialized together. From the testimony presented at trial, all smoked marijuana and drank alcohol. In addition, both Dunn and McGhee had a history of smoking "wet," a marijuana cigarette dipped in formaldehyde that has been cut with a drug known as PCP.

During the daylight hours of January 29, 2003, the four, along with Lowry's uncle and McGhee's cousin, were at McGhee's home in Omaha drinking and smoking marijuana. Washington testified that she and Lowry had been invited over by McGhee and that when they arrived with Dunn and Lowry's uncle, McGhee seemed upset. The party broke up approximately 30 to 45 minutes later.

Later that evening, Lowry and Washington, along with their 4-year-old son, picked up Dunn and returned to McGhee's home. Upon arrival, they observed McGhee involved in a physical altercation with his girlfriend. Though the evidence is not definitive, it appears that Lowry broke up the fight, the girlfriend left, and the others went inside. Washington testified that the girlfriend continued to telephone McGhee at his home throughout the evening.

The party went on for 2 to 3 hours before McGhee and Washington left to purchase alcohol. According to Washington's testimony, in the 15 minutes she and McGhee were out, they had a conversation in which McGhee implied that he was God.

Upon their return, McGhee and Washington resumed a game of dominoes they had been playing, while Dunn and Lowry played pool. All were drinking and smoking marijuana, and at one point, another acquaintance stopped by for a brief visit. Washington and Dunn testified that there had been no arguments or disagreements between McGhee and Lowry that evening, though Dunn indicated that Lowry had initially expressed displeasure that Washington was going with McGhee to purchase alcohol. Both Washington and Dunn also testified that McGhee had been acting strange recently, including during the course of that evening. In particular, Dunn testified that about 5 minutes before Lowry was shot, McGhee had acted "bizarre," pacing around and briefly going outside. Both Dunn and Washington blamed McGhee's general behavior on smoking "wet," although there is no evidence that he was smoking "wet" on this particular evening. In addition, both Dunn and Washington testified that prior to the shooting, neither had seen a gun that evening.

At some point before Lowry was shot, Washington fell asleep on the couch. Lowry ultimately woke her so the couple and their son could leave, but McGhee talked them out of leaving by producing a large bag of marijuana, and Washington went back to sleep. According to Dunn, McGhee tried to get Washington to roll him a "blunt," but she was still sleeping. McGhee refused to let Lowry do it, so Dunn left the room to do it instead.

Dunn testified that he was in the back room when the music suddenly got "concert loud." Dunn then heard a gunshot. Upon returning to the main room, Dunn saw McGhee pointing a gun at him and Lowry lying on the floor.

At about this time, Washington was awakened by her son, who told her that McGhee had hit Lowry with a pool stick and that Lowry was bleeding. McGhee then pointed the gun between Dunn and Washington. While McGhee indicated that he would not shoot them, he nevertheless chased Dunn around the house.

Dunn escaped through the front door, which he and Washington both testified was locked, though it had not been locked earlier in the evening. As he escaped out the front door, Dunn testified he heard another gunshot. Washington testified

that this gunshot was McGhee's shooting Lowry a second time. She also testified that after McGhee shot Lowry the second time, he turned to Washington and said, "I saved you."

Dunn testified that after he left the house, he saw McGhee walk out onto the front porch of the home, but that McGhee did not appear to see Dunn. Dunn then used a nearby pay telephone to call the 911 emergency dispatch service. Dunn waited for police, directing them to McGhee's home upon their arrival.

When McGhee left the house to look for Dunn, Washington locked the front door behind him. Washington testified that she attempted to call 911 using McGhee's telephone, but found that it had been unplugged. Washington then found Lowry's cellular telephone in his pocket and called 911. Meanwhile, McGhee kicked the door in and reentered the house. He took the telephone from Washington, then pointed the gun at Washington and demanded her car keys, which Washington could not find.

McGhee then forced Washington and her son out of the front door of the house and around to the back alley. McGhee then led them on what Washington described as a "zig-zag" path for about a mile. During this time, McGhee stopped to hide when he heard police sirens and kept saying that the victim was "bad" and "not pure" and that he should have killed Dunn as well. Washington also testified that McGhee kept asking her questions about her son, implying that he, McGhee, was the child's father and that he and Washington had been involved in a sexual relationship. Washington testified that this was not true. At one point, McGhee disposed of Dunn's and Lowry's cellular telephones, but soon after retrieved Lowry's telephone. He then used the telephone to call someone to tell him or her that they were coming. Throughout this walk, McGhee had the gun with him and often insisted on carrying Washington's son.

Eventually, the three arrived at McGhee's aunt's home. McGhee again turned the music up, but allowed Washington to use Lowry's cellular telephone to call for a ride. At some point, McGhee's aunt came downstairs. According to Washington, she told the aunt that McGhee had killed Lowry, which McGhee then denied. In contrast, the aunt testified that Washington simply told her that she and her son were waiting for a ride. In any event, the ride arrived and Washington and her son left.

According to Washington, they left the aunt's home sometime between 2 and 3 a.m. on January 30, 2003.

After Washington and her son left, McGhee indicated that he was also leaving. He returned to the aunt's home at about 6 a.m. and went to sleep. Eventually, the police determined his whereabouts, surrounded the home, and took McGhee into custody. The weapon used to kill Lowry was never recovered.

Testimony With Regard to McGhee's Mental State.

Dr. Bruce Gutnik testified for McGhee. Gutnik testified that he evaluated McGhee for approximately 1½ hours and diagnosed him with paranoid schizophrenia with a history of alcohol and cannabis abuse and possible dementia. Gutnik testified that in his opinion, McGhee did not know the difference between right and wrong at the time McGhee shot Lowry. Gutnik additionally testified that he thought McGhee probably did understand that by pointing a gun at Lowry's head and pulling the trigger, Lowry would be severely injured and probably killed, but that McGhee believed he was acting in self-defense. Gutnick also testified that McGhee's actions in evading police, disposing of evidence, and denying responsibility were not inconsistent with the conclusion that McGhee did not know right from wrong. Gutnik reasoned that McGhee had been psychotic and that one should not read too much into McGhee's thought process, as it was not likely to be logical or rational.

Gutnik testified about allegations that McGhee might have been malingering, or faking his symptoms, in order to delay or prevent his return to competency and later for purposes of the insanity defense. According to his testimony, Gutnik did not believe that McGhee was malingering. Gutnik also testified that smoking "wet" could cause delusions and hallucinations, but that those effects should wear off within 6 to 8 hours.

Dr. Louis Martin, a psychiatrist with the Lincoln Regional Center, testified for the State. Martin had been McGhee's treating psychiatrist for at least 2 years during the time when McGhee had been committed pending his return to competency. Martin's initial diagnosis of McGhee was that McGhee suffered from schizophrenia with a history of substance abuse.

In contrast to Gutnik, Martin testified that at the time McGhee shot Lowry, McGhee understood both what he was doing and the nature of his act, and that in spite of McGhee's mental illness, Martin felt McGhee had a basic understanding that what he had done was wrong. Martin felt that McGhee's behavior after the commission of the murder was not "indifferent" and suggested that McGhee was aware that his earlier actions were wrong.

In addition, Martin testified that both he and his staff had had concerns about malingering, notably based upon instances where McGhee would appear closed and noncommunicative when dealing with staff, but perfectly communicative when interacting with other patients. Martin acknowledged that it was difficult to determine where malingering ends and mental illness begins.

ASSIGNMENTS OF ERROR

McGhee assigns that the district court erred in concluding (1) that there was sufficient evidence to support his conviction for first degree murder and (2) that he was sane at the time of the commission of the murder.

STANDARD OF REVIEW

[1] Regardless of whether the evidence is direct, circumstantial, or a combination thereof, and regardless of whether the issue is labeled as a failure to direct a verdict, insufficiency of the evidence, or failure to prove a prima facie case, the standard is the same: In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support the conviction.[1]

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[1] *State v. White*, 272 Neb. 421, 722 N.W.2d 343 (2006).

[2] The verdict of the finder of fact on the issue of insanity will not be disturbed unless there is insufficient evidence to support such a finding.[2]

ANALYSIS

Sufficiency of Evidence.

[3] McGhee first argues that the district court erred in concluding there was sufficient evidence to support his conviction for first degree murder. The elements of first degree murder are listed in Neb. Rev. Stat. § 28-303 (Cum. Supp. 2006), which states that a person commits murder in the first degree if he or she kills another person purposely and with deliberate and premeditated malice. McGhee argues the evidence does not support a finding that the killing was done with deliberate and premeditated malice.

[4-9] Deliberate means not suddenly, not rashly, and requires that the defendant considered the probable consequences of his or her act before doing the act.[3] The term "premeditated" means to have formed a design to commit an act before it is done.[4] One kills with premeditated malice if, before the act causing the death occurs, one has formed the intent or determined to kill the victim without legal justification.[5] No particular length of time for premeditation is required, provided that the intent to kill is formed before the act is committed and not simultaneously with the act that caused the death.[6] The time required to establish premeditation may be of the shortest possible duration and may be so short that it is instantaneous, and the design or purpose to kill may be formed upon premeditation and deliberation at any moment before the homicide is committed.[7] A question of premeditation is for the jury to decide.[8]

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[2] *State v. Harms*, 263 Neb. 814, 643 N.W.2d 359 (2002).

[3] *State v. Robinson*, 272 Neb. 582, 724 N.W.2d 35 (2006).

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.*

It is apparent that the evidence, viewed in a light most favorable to the State, supports the jury's finding that McGhee had acted "purposely and with deliberate and premeditated malice."[9] There was evidence presented that McGhee had invited Washington and Lowry over to his house earlier in the day and seemed upset that they brought others with them.

McGhee later invited the couple over again and persuaded them to stay when they indicated a desire to go home. McGhee then refused to allow Lowry to roll him a "blunt" and instead had Dunn leave the room to do so. This could have been seen as an attempt to get one witness out of the room, and with Washington asleep, the only remaining witness would have been Washington's and Lowry's 4-year-old son.

After getting Dunn to leave the room, McGhee turned the music "concert loud," perhaps to mask the sound of gunshots. Then, in the aftermath of the shooting, Washington attempted to place a telephone call, yet found the telephone to be unplugged. However, according to Washington, the telephone had been ringing throughout the evening.

In addition, both Dunn and Washington testified that the front door was locked, though it had apparently not been locked earlier in the evening and several persons, including Washington and McGhee, had been outside. In fact, according to Dunn, McGhee had been outside only minutes prior to the shooting. Finally, there was testimony by both Dunn and Washington that neither had seen a gun all evening until McGhee produced one and shot Lowry.

In short, when the record is viewed in the light most favorable to the State, there is sufficient evidence to support the conclusion that McGhee committed the killing with deliberate and premeditated malice. As such, McGhee's conviction for first degree murder is supported by the record and his first assignment of error is without merit.

Jury Finding Regarding Sanity.

[10-12] In his second assignment of error, McGhee argues the district court erred in finding that he was sane at the time

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[9] § 28-303.

he killed Lowry. Nebraska follows the *M'Naghten* rule as to the defense of insanity. The test of responsibility for crime is a defendant's capacity to understand the nature of the act alleged to be criminal and the ability to distinguish between right and wrong with respect to the act.[10] For an insanity defense, the insanity must be in existence at the time of the alleged criminal act.[11] A defendant who pleads that he or she is not responsible by reason of insanity has the burden to prove the defense by a preponderance of the evidence.[12] The verdict of the finder of fact on the issue of insanity will not be disturbed unless there is insufficient evidence to support such a finding.[13]

Gutnik testified that in his opinion, McGhee did not know the difference between right and wrong and thought that in killing Lowry, he had done a "good deed and expected people to pat him on the back and say way to go." Gutnik further testified that while McGhee understood that putting a gun to Lowry's head and pulling the trigger would likely result in injury or death to Lowry, McGhee nevertheless thought he was acting in self-defense. Martin, on the other hand, testified that he believed McGhee knew his actions were wrong and that such was evidenced by the fact that McGhee to some extent attempted to cover up his actions.

[13] An appellate court does not resolve conflicts in evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence presented, which are within a fact finder's province for disposition.[14] By rejecting McGhee's insanity defense, the jury clearly believed Martin's testimony that McGhee knew that his actions were wrong. This court will not revisit that finding.

The record contains sufficient admissible evidence for the jury to conclude that McGhee was not insane at the time he shot Lowry. As such, McGhee's second assignment of error is without merit.

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[10] *State v. Harms, supra* note 2.

[11] *Id.*

[12] *Id.* See, also, Neb. Rev. Stat. § 29-2203 (Reissue 1995).

[13] *State v. Harms, supra* note 2.

[14] See *id.*

CONCLUSION

There was sufficient evidence in the record to support both McGhee's conviction for first degree murder and the jury's finding that McGhee was not insane at the time he shot Lowry. As such, the judgment of the district court is affirmed.

AFFIRMED.

SHAYNE MURPHY, APPELLANT, V. CITY OF GRAND ISLAND, APPELLEE.

742 N.W.2d 506

Filed December 14, 2007. No. S-07-087.

1. **Workers' Compensation: Appeal and Error.** On appellate review, the findings of fact made by the trial judge of the Workers' Compensation Court have the effect of a jury verdict and will not be disturbed unless clearly wrong.
2. ____: ____. Pursuant to Neb. Rev. Stat. § 48-185 (Reissue 2004), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.
3. **Workers' Compensation: Proof.** In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the findings of the trial judge who conducted the original hearing.
4. ____: ____. In order to recover under the Nebraska Workers' Compensation Act, a claimant has the burden of proving by a preponderance of the evidence that an accident or occupational disease arising out of and occurring in the course of employment proximately caused an injury which resulted in disability compensable under the act.
5. **Workers' Compensation.** Whether an injury arose out of and in the course of employment must be determined from the facts of each case.
6. **Workers' Compensation: Evidence: Appeal and Error.** In testing the sufficiency of the evidence to support the findings of fact made by the Workers' Compensation Court, the evidence must be considered in the light most favorable to the successful party, and the factual findings by the compensation court have the same force and effect as a jury verdict in a civil case.
7. **Workers' Compensation: Appeal and Error.** When the record in a workers' compensation case presents conflicting medical testimony, an appellate court will not substitute its judgment for that of the compensation court.

Appeal from the Workers' Compensation Court. Affirmed.

Mandy L. Strigenz, of Sibbernsen & Strigenz, P.C., for appellant.

James D. Hamilton, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for EMC Insurance Companies on behalf of appellee City of Grand Island.

Patrick B. Donahue and Dennis R. Riekenberg, of Cassem, Tierney, Adams, Gotch & Douglas, for Travelers Insurance Company on behalf of appellee City of Grand Island.

Paul F. Prentiss and Benjamin E. Maxell, of Timmermier, Gross & Prentiss, for London GI Program on behalf of appellee City of Grand Island.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

WRIGHT, J.

NATURE OF CASE

Shayne Murphy began working as a firefighter and emergency medical technician (EMT) for the City of Grand Island (City) in 1982. In 2002, he tested positive for hepatitis C, and he commenced an action against the City in the Nebraska Workers' Compensation Court. A single judge of the compensation court dismissed Murphy's claim, citing insufficient evidence of causation that the hepatitis C arose out of and in the course of his employment. A three-judge review panel of the compensation court affirmed the trial court's decision. Murphy appeals. The issue is whether there was sufficient evidence to establish that Murphy contracted hepatitis C in the scope and course of his employment with the City.

SCOPE OF REVIEW

[1] On appellate review, the findings of fact made by the trial judge of the Workers' Compensation Court have the effect of a jury verdict and will not be disturbed unless clearly wrong. *Olivotto v. DeMarco Bros. Co.*, 273 Neb. 672, 732 N.W.2d 354 (2007).

FACTS

As part of Murphy's employment as a firefighter and EMT, he assisted ambulances on emergency response calls. He performed CPR, applied bandages, administered oxygen, and provided other medical services.

Murphy received additional EMT training in 1984 and 1985 and, thereafter, spent 70 percent of his time serving as an EMT. He often had direct contact with patients, estimating that he came into physical contact with at least 1 patient on each work shift and sometimes as many as 10. Murphy testified he remembered times he was exposed to bodily fluids.

The City implemented its current safety procedures and protocol for emergency personnel in approximately 1990. These procedures, commonly referred to as "universal precautions," require EMT personnel to wear latex gloves and sometimes goggles to prevent exposure to the bodily fluids of a patient. When the City implemented the precautions, it also began requiring emergency personnel to prepare incident reports, which described when personnel were exposed to a patient's bodily fluids.

Murphy submitted three separate incident reports. The first occurred on September 13, 1990, when a patient was combative and began vomiting and spitting on the ambulance crew. Blood was mixed with the saliva, and the patient's mouth and tongue were bleeding. The incident report showed that Murphy washed his hands and arms with soap and Clorox and that he was wearing latex gloves, but that the patient's bodily fluids may have come into contact with his eyes. Murphy did not remember specifically getting blood in his eyes, nose, or mouth, and his skin was intact at the time of the incident. Murphy did not know if the patient was infected with hepatitis C.

The second incident occurred on May 18, 1991, while Murphy was treating a patient who was gurgling and exhaling blood. Blood got onto Murphy's face, hands, and forearms. He washed his hands with "Clorox water" and was wearing gloves during the exposure, although one glove had a hole in it. The patient's bodily fluids possibly came in contact with Murphy's eyes. He did not know if the patient was infected with hepatitis C.

The third incident occurred September 11, 1992. Murphy was treating a surgical patient whose sutures had broken loose, causing the patient to bleed profusely from her femoral artery. Blood spattered onto Murphy's face, under his gloves, and on his arms, but his skin was intact. He washed his hands with "ER blood spill solution." He did not know if the patient was infected with hepatitis C.

In 2002, Murphy tested positive for hepatitis C. He initiated this lawsuit against the City in the Workers' Compensation Court, claiming that his contraction of hepatitis C arose out of and in the course of his employment with the City.

At trial, evidence was presented that Murphy had engaged in a number of activities over the course of his life that might have exposed him to hepatitis C. These activities included his participation in "Golden Gloves" boxing and football. Murphy was frequently exposed to blood, saliva, and other fluids of his boxing opponents and his teammates. Murphy also underwent arthroscopic surgery to repair a knee following a football-related injury. He was unsure whether he had received a blood transfusion during the surgery.

Murphy offered medical evidence from Drs. Michael F. Sorrell and John A. Wagoner, Jr. Sorrell opined that Murphy's hepatitis C was the result of his employment as an EMT with the City. Sorrell's opinion was based on the assumption that Murphy did not have any risk factors for hepatitis C other than his work. The facts considered by Sorrell were that Murphy was in a monogamous relationship with his wife and she tested negative for hepatitis C and that Murphy had never used intravenous drugs, had never been tattooed or pierced, had normal renal function, had never had dialysis, and had never received a blood transfusion.

Murphy also offered medical evidence from Wagoner in the form of a medical record in which Wagoner noted that Murphy's hepatitis C dated to an incident which was documented in 1990, where he experienced a "blood splash/spill and exposure." Wagoner did not provide a basis for his statement except to note that he had had a "lengthy discussion" with Murphy.

The City offered a report from Dr. Marvin J. Bittner, who stated that he could not conclude with a reasonable degree of

medical certainty that Murphy had acquired hepatitis C as the result of his work as an EMT. Bittner was also of the opinion that no other doctor could conclude that Murphy's hepatitis C was caused by his employment. Bittner opined that many risk factors could not be eliminated. The evidence showed that Murphy had engaged in high-risk activities, described above, that may have exposed him to hepatitis C, and Murphy could not say that patients he came into contact with were infected with hepatitis C.

After reviewing the evidence, the trial judge found that the evidence was insufficient to prove that Murphy had acquired hepatitis C during the scope and course of his employment. Murphy appealed to a three-judge review panel, which affirmed the trial court's decision, and Murphy now appeals to this court.

ASSIGNMENTS OF ERROR

Murphy assigns two errors: (1) The Workers' Compensation Court erred in ruling that causation should be decided in favor of the City and dismissing his action and (2) the compensation court erred in relying on the medical testimony of Bittner.

ANALYSIS

We must determine whether the Workers' Compensation Court was clearly wrong in finding that Murphy failed to prove that he contracted hepatitis C during the scope and course of his employment with the City.

[2,3] Pursuant to Neb. Rev. Stat. § 48-185 (Reissue 2004), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award. *Olivotto v. DeMarco Bros. Co.*, 273 Neb. 672, 732 N.W.2d 354 (2007). In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the findings of the trial judge who conducted the original hearing. *Id.*

The trial court's opinion addressed the arguments that Murphy now makes on appeal. It was undisputed that Murphy had tested positive for hepatitis C, and it was known that hepatitis C could be contracted through various means and sources. According to the Centers for Disease Control and Prevention, the possible sources included intravenous drug use, 60 percent; sexual contact, 15 percent; blood transfusion, 10 percent; occupational, 4 percent; other, 1 percent; and unknown, 10 percent.

The court stated that Murphy had failed to establish that he was ever exposed to a patient who was infected with hepatitis C. When Murphy was exposed to blood or bodily fluids during his employment, there was no evidence of piercing of his skin by a sharp object, nor was there any persuasive evidence that blood was splashed onto a portion of his skin which was broken, cut, or otherwise presented an open entry point. The court noted that the incident reports submitted by Murphy indicated that his skin was intact and that he was possibly exposed via his natural body openings (nose, eyes, or mouth). However, Murphy could not affirmatively state that such was in fact the case. The court concluded that although Murphy was engaged in an occupation which obviously provided a risk for exposure, he was unable to provide any evidence whatsoever that he came in contact with the blood or bodily fluids of an individual infected with hepatitis C. The court noted that Murphy's case was further complicated by the fact that he had other significant risk factors outside his employment in which he was possibly exposed.

The court relied upon the opinion of Bittner, who stated that he could not reach a conclusion with a reasonable degree of medical certainty that Murphy had acquired hepatitis C as the result of his work as an EMT for the City and that he did not believe any other physician could reach that conclusion with a requisite degree of certitude.

The court opined that in the end, the case came down to a matter of proof and persuasion. Murphy had offered proof on the issue of causation in the form of an opinion by Sorrell, but the court was not ultimately persuaded. It could not dismiss the fact that there was no evidence that Murphy had ever been exposed on the job to the blood or bodily fluids of an individual who was infected with hepatitis C. The court stated that

Murphy's "occupational exposures" did not indicate that blood touched anything but intact skin and only "'possibly'" came into contact with his mucous membranes. The court concluded that at best, Murphy's evidence established he was in an occupation involving a higher exposure risk to hepatitis C than other jobs and that this proof was not enough.

Murphy argues that his occupation as an EMT placed him at greater risk of contracting hepatitis C. In support, Murphy relies upon Neb. Rev. Stat. § 71-514.01 (Reissue 2003), which provides in part: "The Legislature hereby finds that health care providers are at risk of significant exposure to the blood and other body fluids of patients as a result of their work." According to Murphy, this statute implies the Legislature has recognized that health care workers are at greater risk for infectious disease and, thus, hepatitis C should be considered an occupational disease. Murphy claims that such an adjudication would change the burden of proof placed upon him and he would not be required to prove the exact date and time that he contracted hepatitis C.

However, Murphy's argument fails to recognize that the problem was not that he failed to prove the date and time he contracted hepatitis C but that he failed to prove it was more likely than not that he contracted hepatitis C during the scope and course of his employment with the City. This was a fact that Murphy was required to prove, and the trial court found that he did not.

[4] In order to recover under the Nebraska Workers' Compensation Act, a claimant has the burden of proving by a preponderance of the evidence that an accident or occupational disease arising out of and occurring in the course of employment proximately caused an injury which resulted in disability compensable under the act. *Sweeney v. Kerstens & Lee, Inc.*, 268 Neb. 752, 688 N.W.2d 350 (2004).

[5,6] Whether an injury arose out of and in the course of employment must be determined from the facts of each case. *Misek v. CNG Financial*, 265 Neb. 837, 660 N.W.2d 495 (2003). In testing the sufficiency of the evidence to support the findings of fact made by the Workers' Compensation Court, the evidence must be considered in the light most favorable to

the successful party, and the factual findings by the compensation court have the same force and effect as a jury verdict in a civil case. *Worline v. ABB/Alstom Power Int. CE Servs.*, 272 Neb. 797, 725 N.W.2d 148 (2006). See, also, *Vega v. Iowa Beef Processors*, 270 Neb. 255, 699 N.W.2d 407 (2005).

In the case at bar, both sides presented evidence of how they believed Murphy contracted hepatitis C. It was within the trial court's discretion to determine which evidence was more persuasive.

Murphy next argues that the court erred in relying on the testimony of Bittner over that of Sorrell and Wagoner. Bittner's opinion stated that he could not conclude with a reasonable degree of medical certainty that Murphy had acquired hepatitis C as the result of his work for the City. Evidence from Sorrell and Wagoner stated that Murphy contracted hepatitis C as a result of his employment with the City.

It is Murphy's position that the evidence of Sorrell and Wagoner established to a reasonable degree of medical certainty that Murphy's hepatitis C was the result of his employment as an EMT for the City. However, Sorrell's opinion was based on the belief that Murphy had no risk factors for hepatitis C other than his work. The trial court noted that Murphy had many risk factors for hepatitis C other than his work, including contact with blood while engaged in football and boxing. Furthermore, Wagoner's notation was based on nothing more than a "lengthy discussion" with Murphy and was merely found within a medical record.

[7] When the record in a workers' compensation case presents conflicting medical testimony, an appellate court will not substitute its judgment for that of the compensation court. *Worline v. ABB/Alstom Power Int. CE Servs., supra*. It was within the discretion of the trial court to have concluded that Sorrell's and Wagoner's opinions were based upon faulty or incomplete information and to therefore decline to accept their conclusions. Bittner's opinion stated that he could not conclude with a reasonable degree of medical certainty that Murphy had contracted hepatitis C as the result of his work as an EMT. Bittner based his opinion on the fact that many risk factors could not be eliminated. The court pointed out that all the

experts were eminently qualified, but it was entirely within the court's authority to determine that Bittner's opinion was more credible. We decline to substitute our judgment for that of the trial court in accepting Bittner's opinion over that of Sorrell and Wagoner.

CONCLUSION

For the reasons set forth above, we conclude that the Workers' Compensation Court did not err in finding insufficient evidence of causation. We therefore affirm the judgment of the Workers' Compensation Court review panel, which affirmed the judgment of the trial court.

AFFIRMED.

IN RE INTEREST OF KEVIN K., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLANT, V. KEVIN K. AND NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES, APPELLEES.

742 N.W.2d 767

Filed December 21, 2007. No. S-06-447.

1. **Juvenile Courts: Appeal and Error.** Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court's findings.
2. **Statutes: Appeal and Error.** Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.
3. **Juvenile Courts: Minors: Jurisdiction.** Where a juvenile is adjudicated solely on the basis of habitual truancy from school pursuant to Neb. Rev. Stat. § 43-247(3)(b) (Reissue 2004), and the status of truancy is subsequently terminated by the lawful execution of a parental release authorizing discontinuation of school enrollment pursuant to Neb. Rev. Stat. § 79-201(3)(d) (Cum. Supp. 2006), a juvenile court may terminate its jurisdiction without a finding that such termination is in the best interests of the juvenile.

Petition for further review from the Court of Appeals, INBODY, Chief Judge, and SIEVERS and MOORE, Judges, on appeal thereto from the Separate Juvenile Court of Lancaster County, LINDA S. PORTER, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

Kara E. Mickle and Alicia B. Henderson, Deputy Lancaster County Attorneys, for appellant.

Dennis R. Keefe, Lancaster County Public Defender, and Elizabeth Elliott, for appellee Kevin K.

Jon Bruning, Attorney General, and B. Gail Steen, Special Assistant Attorney General, for appellee Nebraska Department of Health and Human Services.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

STEPHAN, J.

Applying a best interests test, a divided panel of the Nebraska Court of Appeals held in this case that the separate juvenile court of Lancaster County erred in terminating its jurisdiction of a juvenile previously adjudicated for habitual truancy.[1] After the juvenile reached the age of 16, his mother authorized discontinuance of his enrollment in school pursuant to Neb. Rev. Stat. § 79-201 (Cum. Supp. 2006). On further review, we conclude that because the lawful discontinuation of school enrollment necessarily ended the juvenile's status as a truant, which was the sole basis for his adjudication, the juvenile court did not err in concluding that it was no longer necessary or appropriate to exercise its jurisdiction.

BACKGROUND

The State of Nebraska, through the Lancaster County Attorney, commenced this juvenile proceeding by filing a truancy petition in the separate juvenile court on March 22, 2005. The State alleged that Kevin K. had been truant from school on various dates in January and February 2005. Kevin, born on August 21, 1989, was 15 years old when the action was commenced. He resided with his mother in Lincoln, Nebraska.

At an adjudication hearing on April 22, 2005, Kevin admitted the allegations of truancy in his mother's presence and with her consent. He was adjudicated pursuant to Neb. Rev. Stat.

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[1] *In re Interest of Kevin K.*, 15 Neb. App. 641, 735 N.W.2d 812 (2007).

§ 43-247(3)(b) (Reissue 2004) based upon a finding by the juvenile court that he had been habitually truant from school as alleged in the petition. The juvenile court placed Kevin in the temporary legal custody of the Nebraska Department of Health and Human Services (DHHS) and ordered that he participate in a summer school program if it could be arranged by DHHS and that he cooperate with any evaluations arranged by DHHS. Following a disposition hearing at which it received and considered a report and evaluation submitted by DHHS, the juvenile court entered an order on July 14, 2005, in which it concluded that "returning legal custody to the parent would be contrary to the welfare of the child at this time due to the need to monitor Kevin's school attendance and to provide supportive services to Kevin to assist him in correcting his truancy problem while residing in his parent's home." The court ordered Kevin to continue in the temporary legal custody of DHHS "for placement, treatment and care" while remaining in the physical custody of his mother. The order further provided that Kevin was to "attend all scheduled classes without any truancies or tardies" and that "[a]ny illnesses shall be verified through a medical provider, school nurse or health paraprofessional." Kevin's mother was ordered not to "excuse Kevin . . . from school without prior approval" of DHHS.

On November 21, 2005, Kevin filed a motion to terminate jurisdiction. He alleged that after he reached the age of 16 on August 21, his mother signed a release pursuant to § 79-201(3)(d) which discontinued his enrollment in school effective November 3. At a hearing on the motion, the DHHS caseworker assigned to Kevin's case requested that "the case be closed" because Kevin was no longer in school and there were no further services which DHHS could provide to him. The caseworker testified that Kevin's mother discussed the release with the caseworker before signing it, explaining that she wanted to give Kevin a fresh start by allowing him to enroll in a GED program or find a job. At the time of the hearing, Kevin had done neither. The caseworker testified that he tried to discourage Kevin's mother from authorizing discontinuation of Kevin's school enrollment because he believed that remaining in school would be in Kevin's best interests; but he told

her that if she decided to do so, DHHS would ask the juvenile court to terminate jurisdiction. The caseworker testified that Kevin's mother did not need DHHS' permission to authorize discontinuation of Kevin's school enrollment when he reached the age of 16.

Kevin's mother testified that she decided to withdraw Kevin from school so that he could "explore his other options." She confirmed that despite her urging, Kevin had not enrolled in a GED program or obtained employment. Kevin testified that he planned to get a job, but had not been "in a hurry" to find one.

The juvenile court found that Kevin's best interests would not be served by a termination of jurisdiction because he "has no daily program, is not enrolled in a GED program, is not employed and indeed has no significant work history whatsoever." Referring to one of the purposes of the Nebraska Juvenile Code, the court noted that Kevin's situation "does not bode well for his 'development of his capacity for a healthy personality, physical well-being, and useful citizenship and to protect the public interest.'"[2]

However, the court concluded that a best interests standard did not apply to the termination of its jurisdiction in this case because the provision of § 79-201(3)(d) permitting a parent or custodian to authorize discontinuation of enrollment in school at the age of 16 "in effect negates his or her status or definition as a 'habitually truant' juvenile over whom the court should exercise jurisdiction under Neb. Rev. Stat. Section 43-247 (3)(b)." The court noted that this provision of the compulsory education statute made no exception for juveniles under the jurisdiction of the juvenile court and used broad language in authorizing a "parent or legal guardian" to discontinue school enrollment when the child reached the age of 16. The juvenile court concluded:

> [W]hen a youth, by virtue of a parent's exercise of a right granted by the State of Nebraska, has been lawfully withdrawn from school and is no longer legally required to be enrolled in school, it is no longer necessary nor appropriate

[2] See Neb. Rev. Stat. § 43-246(1) (Reissue 2004).

> for the Court to exercise jurisdiction in a case based solely upon the youth's truancy.

The State, through the Lancaster County Attorney, appealed this decision to the Nebraska Court of Appeals. DHHS appeared as an appellee and argued that the decision of the juvenile court was correct and should be affirmed. In its majority opinion reversing the juvenile court's decision, the Court of Appeals reasoned that the Nebraska Juvenile Code "does not set forth that the factual basis justifying the juvenile court's acquisition of jurisdiction must continue to exist throughout the duration of the juvenile court's exercise of that jurisdiction."[3] Noting that Kevin remained a minor, and relying in part on an Illinois Court of Appeals' decision,[4] the majority reasoned that a best interests test should be applied. Adopting the findings of the juvenile court in its de novo review, the majority concluded that termination of jurisdiction was not in Kevin's best interests. It reversed, and remanded to the juvenile court for further proceedings.

A dissenting judge noted that the decision of the majority had the effect of placing a limitation on the statutory right of a parent to authorize discontinuance of a 16-year-old child's school enrollment "by excluding children who are under the jurisdiction of the juvenile court."[5] The dissent reasoned that while such a limitation may be appropriate, "it is for the Legislature, and not the courts, to make this decision."[6] The dissent concluded that because Kevin's mother had authorized discontinuation of his school enrollment, Kevin could no longer be considered truant, and that the sole basis for the exercise of the juvenile court's jurisdiction had ceased to exist.

We granted a petition for further review filed jointly by Kevin and DHHS.

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[3] *In re Interest of Kevin K., supra* note 1, 15 Neb. App. at 645, 735 N.W.2d at 816.

[4] *In Interest of C.W.*, 292 Ill. App. 3d 201, 684 N.E.2d 1076, 226 Ill. Dec. 80 (1997).

[5] *In re Interest of Kevin K., supra* note 1, 15 Neb. App. at 647, 735 N.W.2d at 817 (Moore, Judge, dissenting).

[6] *Id.*

ASSIGNMENT OF ERROR

Kevin and DHHS contend, restated, that the Nebraska Court of Appeals erred in concluding that § 43-247 requires a juvenile court to retain jurisdiction over a minor who has been adjudicated as habitually truant from school, but is subsequently withdrawn from school by a parent pursuant to § 79-201(3)(d).

STANDARD OF REVIEW

[1] Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court's findings.[7]

[2] Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.[8]

ANALYSIS

Like any juvenile truancy case, this appeal involves the interplay between the Nebraska Juvenile Code and Nebraska's compulsory education statutes. Under the code, a juvenile court may exercise jurisdiction over a juvenile who is "habitually truant from . . . school,"[9] but neither the code nor the compulsory education statutes define the term "truant." In *In re Interest of K.S.*,[10] this court held that "the mere fact that the child is not complying with the compulsory education laws without being first excused by school authorities establishes truancy" and, accordingly, jurisdiction under the truancy provisions of the Nebraska Juvenile Code. We further noted in that case that under the compulsory attendance law then in effect, only school authorities had authority to grant permission to be absent, and that thus, parental consent to an absence of a child who was legally required to attend school did not alter the fact of truancy.

Due to a subsequent amendment in the compulsory school attendance statutes, this principle no longer applies in the case of certain children who have not reached the mandatory

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[7] *In re Interest of Jeffrey K.*, 273 Neb. 239, 728 N.W.2d 606 (2007).

[8] *Jones v. Shelter Mut. Ins. Cos., ante* p. 186, 738 N.W.2d 840 (2007).

[9] § 43-247(3)(b).

[10] *In re Interest of K.S.*, 216 Neb. 926, 931, 346 N.W.2d 417, 420 (1984).

attendance age. Prior to 2004, Nebraska law made school attendance mandatory for any child "who is not less than seven years of age and not more than sixteen years of age."[11] In 2004, the compulsory attendance law was amended to make school attendance mandatory for children between the ages of 6 and 18 who have not obtained a high school diploma or completed a program of instruction in certain schools, subject to a parental right to withdraw a child from school when he or she reaches the age of 16.[12] The law now provides that school attendance is not mandatory where a child "[h]as reached the age of sixteen years and such child's parent or guardian has signed a notarized release discontinuing the enrollment of the child on a form provided by the school."[13] There is no statutory restriction on the right of a parent or guardian to authorize discontinuance of school enrollment for children who have reached the age of 16, and the statute makes no specific reference to children who are subject to the jurisdiction of a juvenile court when they reach that age. In its present form, the compulsory education statute can be said to articulate two related principles of public policy: (1) that it is generally in the best interest of children who have not graduated from high school or completed a program of instruction to remain in school until they reach the age of 18 and (2) that parents and guardians have an unqualified right to determine whether this general principle should apply to their 16- and 17-year-old children.

By adjudicating Kevin as a habitual truant, the juvenile court obtained jurisdiction over his mother as well.[14] Although the court ordered her not to excuse Kevin from school without prior approval of DHHS, we do not read this provision of the dispositional order as prohibiting Kevin's mother from exercising her statutory right to discontinue his school enrollment when he reached the age of 16, and we do not reach the issue of whether a juvenile court could lawfully impose such a restriction. The record reflects no judicial determination that Kevin's mother

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[11] § 79-201 (Reissue 2003).

[12] 2004 Neb. Laws, L.B. 868, § 1.

[13] § 79-201(3)(d) (Cum. Supp. 2006).

[14] See § 43-247(5).

was unfit or legally incompetent at the time she executed the release authorizing the discontinuance of Kevin's enrollment in school. On the effective date of the release, Kevin was no longer subject to the compulsory school attendance statutes, and as a matter of law, he was no longer truant.

Truancy is not a crime, and juveniles who are adjudicated as habitually truant under § 43-247(3)(b) are considered "[s]tatus offenders" under the Nebraska Juvenile Code.[15] Kevin's status changed when his mother lawfully authorized discontinuation of his enrollment in school. Although he was still a juvenile within the meaning of the code, he was not and could never again be truant, because he was no longer subject to the compulsory education statutes. The Nebraska Juvenile Code provides that a juvenile court's jurisdiction over an adjudicated individual "shall continue until the individual reaches the age of majority or the court otherwise discharges the individual from its jurisdiction."[16] There is no statutory requirement that in all cases, termination of jurisdiction must be shown to be in the best interests of the juvenile.

[3] We hold that where a juvenile is adjudicated solely on the basis of habitual truancy from school pursuant to § 43-247(3)(b), and the status of truancy is subsequently terminated by the lawful execution of a parental release authorizing discontinuation of school enrollment pursuant to § 79-201(3)(d), a juvenile court may terminate its jurisdiction without a finding that such termination is in the best interests of the juvenile. We agree with the determination of the juvenile court that under the circumstances presented in this case, it is neither necessary nor appropriate to continue to exercise its jurisdiction.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals is reversed, and this matter is remanded to that court with directions to affirm the judgment of the juvenile court terminating its jurisdiction in this case.

REVERSED AND REMANDED WITH DIRECTIONS.

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[15] Neb. Rev. Stat. § 43-245(15) (Reissue 2004).

[16] § 43-247.

PAMELA JOANN GRESS, APPELLEE AND CROSS-APPELLANT, V. PATRICK RAYMOND GRESS, APPELLANT AND CROSS-APPELLEE.

743 N.W.2d 67

Filed December 21, 2007. No. S-06-607.

1. **Child Custody: Property Division: Child Support: Alimony.** Domestic matters such as child custody, division of property, child support, and alimony are entrusted to the discretion of trial courts.
2. **Appeal and Error.** A trial court's determinations on domestic matters are reviewed de novo on the record to determine whether there has been an abuse of discretion by the trial judge.
3. **Judgments: Appeal and Error.** In reviewing orders on domestic matters, an appellate court conducts its own appraisal of the record to determine whether the trial court's judgments are untenable such as to have denied justice.
4. **Child Support: Rules of the Supreme Court: Appeal and Error.** Interpretation of the Nebraska Child Support Guidelines presents a question of law, regarding which an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
5. **Child Support: Alimony.** A party's alimony obligation is to be set according to the income he or she has available after his or her child support obligations, if any, have been accounted for.
6. **Child Support.** Before determining an individual's child support obligation, the trial court must identify the monthly incomes for both the custodial and noncustodial parents.
7. **Child Support: Taxation.** As a general matter, in the determination of child support, income from a self-employed individual is determined by looking to that person's tax returns.
8. **Modification of Decree: Child Support: Proof.** A party can modify a prior child support order by showing that there has been a material change in circumstances since the court's prior order.
9. **Modification of Decree: Child Support: Rules of the Supreme Court: Proof.** A party who seeks to have a prior child support order modified can prove that a modification is warranted simply by a showing of the conditions described in paragraph Q of the Nebraska Child Support Guidelines.
10. **Child Support: Rules of the Supreme Court.** As a general matter, child support obligations should be set according to the provisions of the Nebraska Child Support Guidelines.
11. ____: ____. A court may deviate from the Nebraska Child Support Guidelines, but only if it specifically finds that a deviation is warranted based on the evidence.
12. ____: ____. Absent a clearly articulated justification, any deviation from the Nebraska Child Support Guidelines is an abuse of discretion.
13. **Child Support.** In determining child support, a court's findings regarding an individual's level of income should not be based on the inclusion of income that is entirely speculative in nature.

14. ____. A court's findings regarding the propriety of child support obligations should not be based on costs that are entirely speculative.
15. **Modification of Decree: Child Support.** Changes in the financial position of the parent obligated to pay support often warrant a modification of the support order.
16. ____: ____. Regarding child support, increased financial obligations, like decreased income, will qualify as a change in one's financial position.
17. **Social Security: Minors: Intent.** The federal government provides Social Security to special needs children with the intent that it will supplement other income, not substitute for it.
18. **Alimony.** The test for the propriety of an alimony award is whether it is reasonable in light of the parties' circumstances.
19. **Alimony: Rules of the Supreme Court: Presumptions.** An alimony award which drives the obligor's income below the basic subsistence limitation set forth in paragraph R of the Nebraska Child Support Guidelines is presumptively an abuse of judicial discretion unless the court specifically finds that conformity with paragraph R would work an unjust or inappropriate result in that particular case.
20. **Alimony.** The primary purpose of alimony is to assist an ex-spouse for a period of time necessary for that individual to secure his or her own means of support.
21. ____. Above all else, the duration of an alimony award must be reasonable.

Appeal from the District Court for Otoe County: DANIEL BRYAN, JR., Judge. Affirmed in part, and in part reversed and remanded with directions.

Louie M. Ligouri, of Ligouri Law Office, for appellant.

Stefanie S. Flodman and Steven J. Flodman, of Johnson, Flodman, Guenzel & Widger, for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

HEAVICAN, C.J.

I. INTRODUCTION

This action originated as a petition for dissolution of marriage between Pamela Joann Gress and Patrick Raymond Gress. The district court dissolved the marriage between the parties, divided their assets, and ordered Patrick to make monthly child and spousal support payments. Patrick appealed, citing an error in the district court's calculation of child support and alimony. On appeal, we concluded the district court improperly calculated child support. We therefore remanded the cause for further

proceedings, instructing the court to recalculate Patrick's share of child support and to make any necessary changes to the alimony award.[1]

On remand, the district court made a slight reduction in Patrick's child support obligation and reinstated its order that Patrick pay alimony of $1,000 per month for 60 months. Patrick now appeals, once again arguing that the district court erred in setting the amount of his child and spousal support obligations. Pamela cross-appeals, contending the district court erred by limiting alimony to a period of 60 months. For reasons developed in detail below, we affirm the district court's child support order and the duration of the alimony award, but reverse the court's order with regard to the amount of alimony.

II. BACKGROUND

Because a more thorough statement of facts can be found in our prior opinion,[2] we recount only facts relevant to this appeal. During the marriage, Pamela was a stay-at-home mother while Patrick, a lifelong farmer, worked the family's farm. In September 2003, Pamela petitioned for a divorce. Patrick and Pamela have four children ranging in age from 5 to 17. The youngest of the Gress children was born with Down syndrome.

On December 15, 2004, the district court entered an order which dissolved the marriage, divided the couple's assets and liabilities, and ordered Patrick to pay child support and alimony. Specifically, Patrick was ordered to pay, among other things, child support of $1,285 per month and alimony of $1,000 per month for 60 months. As noted above, Patrick appealed to this court, and after identifying an error in the district court's calculation of depreciation in Patrick's income, we remanded the cause for further proceedings, instructing the court to adjust the amount of Patrick's child support responsibilities. On remand, the court reduced Patrick's child support obligation to $1,224 per month and reinstated its order that Patrick pay Pamela alimony of $1,000 per month for 60 months. Patrick was also

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[1] *Gress v. Gress*, 271 Neb. 122, 710 N.W.2d 318 (2006).

[2] See *id.*

ordered to pay an "80.5 %" share of any daycare costs. Both parties now appeal.

III. ASSIGNMENTS OF ERROR

Patrick assigns, restated and renumbered, that the district court erred in calculating Patrick's child support obligation by (1) basing the calculation on an average of his incomes from 2001 through 2003, (2) disregarding paragraph Q of the Nebraska Child Support Guidelines, (3) violating paragraph R of the Nebraska Child Support Guidelines, and (4) failing to take the youngest child's Social Security benefits into consideration. Additionally, Patrick assigns that the district court erred in (5) awarding an unreasonable amount of alimony to Pamela.

In her cross-appeal, Pamela assigns that the district court erred by limiting Patrick's alimony obligation to 60 months.

IV. STANDARD OF REVIEW

[1-3] Domestic matters such as child custody, division of property, child support, and alimony are entrusted to the discretion of trial courts.[3] A trial court's determinations on such issues are reviewed "de novo on the record to determine whether there has been an abuse of discretion by the trial judge."[4] Under this standard, an appellate court conducts its "own appraisal of the record" to determine whether the trial court's judgments "are untenable such as to have denied justice."[5]

[4] Finally, we note that interpretation of the Nebraska Child Support Guidelines presents a question of law, regarding which an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.[6]

V. ANALYSIS

[5] Taken together, the parties' assignments of error concern either the amount of Patrick's child support obligation or the

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[3] See *Robb v. Robb*, 268 Neb. 694, 687 N.W.2d 195 (2004).

[4] *Gress, supra* note 1, 271 Neb. at 124, 710 N.W.2d at 323. See, also, *Robb, supra* note 3.

[5] *Guggenmos v. Guggenmos*, 218 Neb. 746, 748, 359 N.W.2d 87, 90 (1984).

[6] *Workman v. Workman*, 262 Neb. 373, 632 N.W.2d 286 (2001).

amount and duration of Patrick's spousal support obligation. The Nebraska Child Support Guidelines (hereinafter NCSG) instruct that a party's alimony obligation is to be set according to the income he or she has available *after* his or her child support obligations, if any, have been accounted for.[7] Accordingly, we begin with an analysis of the district court's child support determination, then the alimony award.

1. Child Support

Patrick argues that the trial court erred in ordering him to pay $1,224 per month in child support. He offers four distinct reasons why this figure is erroneous. First, Patrick argues that the court erred in averaging his incomes from 2001 through 2003. Patrick contends the court should have used an 8-year average instead or, at the very least, should have included Patrick's income from 2004 in its average. Second, Patrick argues that the district court erred by disregarding paragraph Q of the NCSG in setting child support. Third, Patrick argues that the district court erred by ordering an amount of child support which allegedly violates paragraph R of the NCSG. Finally, Patrick argues that the district court incorrectly ignored the Social Security allowance in setting Patrick's child support obligation. We address each argument in turn in the sections that follow.

(a) Income Averaging

[6] In his primary argument, Patrick asserts that the district court erred in averaging his annual income for the purpose of calculating his monthly child support obligation. Before determining an individual's child support obligation, the trial court must identify the monthly incomes for both the custodial and noncustodial parents.[8] As a self-employed farmer, Patrick's income is prone to fluctuations from year to year. The NCSG anticipates this contingency and provides that "[i]n the event of substantial fluctuations of annual earnings of either party during

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[7] Nebraska Child Support Guidelines, paragraph M. See, also, *Gress, supra* note 1.

[8] See *Gress, supra* note 1 (citing *Gangwish v. Gangwish*, 267 Neb. 901, 678 N.W.2d 503 (2004)).

the immediate past 3 years, the income may be averaged to determine the percent of contribution of each parent . . . .'"[9]

In 2001, Patrick's annual income was $51,654. In 2002, this figure increased to $61,059, only to plummet to $28,400 in 2003. These figures translate to an approximate 18-percent increase from 2001 to 2002, then a 54-percent drop from 2002 to 2003. This is the sort of substantial fluctuation that the NCSG contemplates. Therefore, it was entirely proper for the district court to use income averaging to calculate Patrick's income for child support purposes. Patrick contends, however, that the district court erred by (1) using a 3-year average instead of an 8-year average or, alternatively, (2) not including Patrick's income from 2004 in its average.

(i) 8-Year Average

Per Pamela's suggestion, the district court averaged Patrick's annual income from 2001 through 2003 to identify Patrick's income for child support purposes. Averaging these figures gave Patrick an estimated gross income of $47,037 per year, or $3,920 per month. Patrick argues that the court should have used an 8-year average rather than a 3-year average to estimate his income. Using the figures Patrick supplies in his brief for the additional 5 years, an 8-year average would result in an income of $34,065 per year, or $2,839 per month.

In support of his claim that the court should have used an 8-year average, Patrick cites testimony by his tax preparer, Gerald Siefken, a farm tax expert. Siefken testified that farmers' incomes are inherently unpredictable and that it was his practice to use an 8- or 10-year average to calculate farmers' taxes. Patrick emphasizes that his incomes from 2001 and 2002 are some of the highest incomes he has had in recent history. Patrick argues that using those 2 years as two-thirds of the average misrepresents his actual level of income. Relying on Siefken's testimony, Patrick suggests that only an 8-year average will accurately reflect his present level of income. The question, then, is whether the district court abused its discretion by using a 3-year average instead of an 8-year average.

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[9] Nebraska Child Support Guidelines, worksheet 1 (fourth footnote).

We have not yet had occasion to consider the number of years a court should—or must—use when averaging an income pursuant to the NCSG. As stated above, the NCSG provides that in the event of a fluctuation within "the immediate past 3 years, the income may be averaged."[10] This language could be read as indicating that a fluctuation within the prior 3 years should trigger an average of the incomes only from those prior 3 years. On the other hand, it is entirely possible to read this language as standing for the proposition that a fluctuation in the prior 3 years triggers some form of averaging, be it 3 years, 8 years, or some other number.

This was apparently the reading the Nebraska Court of Appeals adopted in *Wagoner v. Tracy*.[11] In *Wagoner*, the court acknowledged that the NCSG "refer[s] to a 3-year average," but nonetheless permitted a 5-year average.[12] The court reasoned that such an average "result[ed] in a more fair representation of [the husband's] income" than a 3-year average.[13] Similarly, the Court of Appeals had allowed a 4-year average in *Hughes v. Hughes*.[14]

Although we previously discussed income averaging in *Peter v. Peter*,[15] that case dealt solely with the threshold question of when averaging is appropriate and did not describe how to actually conduct the average. It is perhaps worth noting, however, that the average at issue in *Peter* was a 3-year average.[16] In fact, *Wagoner* and *Hughes* aside, it appears that income averaging is almost always discussed with reference to a 3-year average in Nebraska.[17]

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[10] *Id.*

[11] *Wagoner v. Tracy*, No. A-05-301, 2006 WL 3487649 (Neb. App. Dec. 5, 2006) (not designated for permanent publication).

[12] *Id.* at *7.

[13] *Id.*

[14] *Hughes v. Hughes*, 14 Neb. App. 229, 706 N.W.2d 569 (2005).

[15] *Peter v. Peter*, 262 Neb. 1017, 637 N.W.2d 865 (2002).

[16] *Id.*

[17] See, e.g., *Gase v. Gase*, 266 Neb. 975, 671 N.W.2d 223 (2003); *Willcock v. Willcock*, 12 Neb. App. 422, 675 N.W.2d 721 (2004); *Coffey v. Coffey*, 11 Neb. App. 788, 661 N.W.2d 327 (2003).

A survey of decisions from other jurisdictions reveals a similar pattern. Indiana's child support guidelines expressly recommend a 2- or 3-year average.[18] A number of other courts use 3- or 4-year averages when calculating an obligor's income for child support purposes.[19] It seems that only a few states go as high as a 5-year average. North Dakota expressly allows up to a 5-year average by law,[20] and courts in Iowa and Minnesota have used 5-year averages.[21]

The Iowa Supreme Court's willingness to use a 5-year average is particularly relevant. Similar to Patrick's arguments in this case, a farmer argued before the Iowa Supreme Court that he deserved a 5-year average of his income for child support purposes due to fluctuations inherent in farming incomes. The court agreed.[22] Not all courts go beyond 3 years when faced with highly unpredictable forms of self-employment, however. For example, in *In re Marriage of Nelson*,[23] the Illinois Court of Appeals used a 3-year average for a farmer. Similarly, in *Zimin v. Zimin*,[24] an Alaskan fisherman insisted that only a 10-year average could fairly assess his highly unpredictable income for child support purposes. The Alaska Supreme Court disagreed, concluding that a "three-year average . . . provide[s] an accurate estimate of a parent's current earning capacity when a parent's income is subject to yearly fluctuations."[25]

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[18] See *Lloyd v. Lloyd*, 755 N.E.2d 1165 (Ind. App. 2001).

[19] See, e.g., *In re Marriage of Garrett*, 336 Ill. App. 3d 1018, 785 N.E.2d 172, 271 Ill. Dec. 521 (2003) (3-year average); *Roberts v. Roberts*, 924 So. 2d 550 (Miss. App. 2005) (same); *Alexander v. Alexander*, 34 S.W.3d 456 (Tenn. App. 2000) (4-year average); *Fleenor v. Fleenor*, 992 P.2d 1065 (Wyo. 1999) (3-year average).

[20] N.D. Admin. Code 75-02-04.1-05 (2003).

[21] See, *In re Marriage of Robbins*, 510 N.W.2d 844 (Iowa 1994); *Tipler v. Edson*, No. A05-1518, 2006 WL 1390439 (Minn. App. May 23, 2006) (unpublished opinion).

[22] *In re Marriage of Robbins, supra* note 21.

[23] *In re Marriage of Nelson*, 297 Ill. App. 3d 651, 698 N.E.2d 1084, 232 Ill. Dec. 654 (1998).

[24] *Zimin v. Zimin*, 837 P.2d 118 (Alaska 1992).

[25] *Id.* at 123 n.9.

The foregoing compels several conclusions. First, it appears that both here and elsewhere, a 3-year average tends to be the most common approach in cases where a parent's income tends to fluctuate. Second, even among the jurisdictions which permit an average of more than 3 years, courts appear reluctant to use more than a 5-year average. Therefore, even assuming that income averaging under the NCSG is not limited to a 3-year average, the authority from both Nebraska and elsewhere suggests that the district court did not abuse its discretion by declining to use an 8-year average.

It is theoretically possible that the district court could have reached a more accurate assessment of Patrick's current earning capacity by including additional years in its average. However, we believe that the use of a 3-year average in this instance is not so "clearly untenable" that it "unfairly deprives [Patrick] of a substantial right" or denies him "a just result."[26]

(ii) Annual Income From 2004

Patrick next argues that the district court erred in failing to include his income from 2004 either in addition to the 3 years the district court selected for its average or as a replacement for one of those years.

[7] As a general matter, in the determination of child support, income from a self-employed individual is determined by looking to that person's tax returns.[27] At trial, tax returns showing Patrick's incomes for 2001 through 2003 were offered and admitted into evidence. It appears that a tax return for 2004 was never offered. This is not surprising, given that the trial was held during 2004.

In addition, we recognize that a party undergoing a divorce may have both the motive and the opportunity to underreport his or her own income.[28] Indeed, Siefken, Patrick's tax preparer, testified that a farmer can easily, and legally, manipulate his or

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[26] See *State v. Anglemyer*, 269 Neb. 237, 242, 691 N.W.2d 153, 159 (2005).

[27] See, *Rhoades v. Rhoades*, 258 Neb. 721, 605 N.W.2d 454 (2000) (citing *Marr v. Marr*, 245 Neb. 655, 515 N.W.2d 118 (1994), and Nebraska Child Support Guidelines, paragraph D).

[28] See *Ferguson v. Ferguson*, 357 N.W.2d 104 (Minn. App. 1984).

her income simply by harvesting crops and storing them until the following year. As it turns out, Patrick had unsold grain in his possession while the divorce was pending.

All of the above is not to suggest that Patrick himself has engaged in any intentional efforts to underreport his income. The point is that even if Patrick had supplied information about his income for 2004, the district court had ample justification to view such information with skepticism. Accordingly, the district court did not abuse its discretion by excluding 2004 from its average of Patrick's income.

(b) Paragraph Q

Patrick next argues that the district court erred when it failed to consider paragraph Q of the NCSG. Paragraph Q provides the following:

> Modification. Application of the child support guidelines which would result in a variation by 10 percent or more, but not less than $25, upward or downward, of the current child support obligation, child care obligation, or health care obligation, due to financial circumstances which have lasted 3 months and can reasonably be expected to last for an additional 6 months, establishes a rebuttable presumption of a material change of circumstances.

Patrick quotes a portion of this language in his brief, but fails to explain what difference it makes in his legal position. This likely stems from the fact that paragraph Q is unrelated to the present case.

[8,9] Under Nebraska law, a party can modify a prior child support order by showing there has been a material change in circumstances since the court's prior order.[29] Restated, paragraph Q explains that a material change is presumed if a parent's recalculated child support obligation—using current financial information—would result in a deviation of at least 10 percent over the parent's old obligation, provided the current financial information has been accurate for the prior 3 months and will stay accurate for the next 6 months. As construed by the Court of Appeals, a party who seeks to have a prior child

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[29] See *Rauch v. Rauch*, 256 Neb. 257, 590 N.W.2d 170 (1999).

support order modified can prove that a modification is warranted simply by a showing of the conditions described in paragraph Q.[30]

We do not see, and Patrick fails to explain, how the presumption created by paragraph Q is relevant. First, this case did not originate as a petition to modify a prior child support order; it is actually the district court's attempt to establish an initial child support order. Second, and relatedly, neither party contends that there has been a material change in circumstances. Accordingly, we see no merit in Patrick's assignment of error involving paragraph Q.

(c) Paragraph R

Patrick next argues the district court erred by ordering a child support obligation which pushes his income below the poverty line. If true, it would contravene paragraph R of the NCSG. In its current form, paragraph R states:

> Basic Subsistence Limitation. A parent's support, child care, and health care obligation shall not reduce his or her net income below the minimum of $851 net monthly for one person, or the poverty guidelines updated annually in the Federal Register by the U.S. Department of Health and Human Services under authority of 42 U.S.C. § 9902(2), except minimum support may be ordered as defined in paragraph I above.

This language makes clear that any child support obligation which reduces a parent's net monthly income below $851—the basic subsistence limitation—violates the NCSG, except that a parent may be ordered to pay the greater of $50 or 10 percent of his or her net income per month.

[10-12] As a general matter, child support obligations should be set according to the provisions of the NCSG.[31] A court may deviate from the guidelines, but only if it specifically finds that a deviation is warranted based on the evidence.[32] Absent a clearly articulated justification, any deviation from the NCSG is

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[30] See *Sneckenberg v. Sneckenberg*, 9 Neb. App. 609, 616 N.W.2d 68 (2000).

[31] See *Sears v. Larson*, 259 Neb. 760, 612 N.W.2d 474 (2000).

[32] See *id.*

an abuse of discretion.[33] The district court never indicated that a deviation from paragraph R was warranted. Therefore, the court abused its discretion if its child support order drives Patrick's income below the poverty line set forth in paragraph R.

Based on the income figures supplied for 2001 through 2003, the district court found Patrick's current gross income was $47,037 per year, or $3,920 per month. After taxes, this leaves Patrick with a net monthly income of $2,657.85. From this amount, Patrick was ordered to pay $1,224 per month in child support. That leaves Patrick with $1,433.85 per month, an amount well above the current poverty line.

This is not the end of the inquiry, however, because the district court burdened Patrick with other potential child support obligations in addition to his monthly support payments. Pursuant to paragraph O of the NCSG, Patrick was ordered to pay "80.5 %" of any daycare costs for the children. This daycare obligation is also subject to paragraph R's basic subsistence limitation.[34]

At the outset, we note our suspicion that the district court meant to order Patrick to pay *79.75* percent of future child support costs, rather than 80.5 percent. Our belief is predicated on the fact that 80.5 percent is roughly the amount of child support Patrick was responsible for under the district court's original order that we reversed on appeal. Pursuant to our remand, Patrick's recalculated child support responsibility is 79.75 percent. As a result, we believe the district court intended to require Patrick to pay 79.75 percent, not 80.5 percent, of any daycare costs.

Regardless of the precise proportion, there is nothing in the record to help identify what these costs will be in actual dollars. Although it is certainly possible that paying his share of daycare will reduce Patrick's income below the poverty line, the lack of concrete numbers makes it difficult, if not impossible, to

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[33] See *Gress, supra* note 1. See, also, *In re Marriage of Mellott*, 32 Kan. App. 2d 1031, 93 P.3d 1219 (2004).

[34] Nebraska Child Support Guidelines, paragraph R. See, also, *Henke v. Guerrero*, 13 Neb. App. 337, 692 N.W.2d 762 (2005) (citing *Kearney v. Kearney*, 11 Neb. App. 88, 644 N.W.2d 171 (2002)).

say for sure. The speculative nature of Patrick's daycare obligations renders it unnecessary for us to comment on whether the court's order violates paragraph R.

[13,14] We have previously held that a "court's findings regarding [an individual's] level of income should not be based on the inclusion of income that is entirely speculative in nature."[35] This principle works equally well in reverse, such that a court's findings regarding the propriety of child support obligations should not be based on costs that are entirely speculative. In the absence of concrete facts, we decline to consider at this juncture whether Patrick's obligation to pay a sizable portion of his children's daycare costs violates paragraph R.

[15,16] Of course, our decision does not mean that Patrick must suffer daycare costs that exceed his earning capacity. This is because "changes in the financial position of the parent obligated to pay support" often warrant a modification of the support order.[36] Ordinarily, such changes arise when the obligor's income is increased or decreased substantially. Obviously, increased financial obligations, like decreased income, also qualify as a change in one's financial position. As a result, if Patrick is ever forced to pay for daycare and his income is reduced below the poverty line as a result, Patrick may seek a modification of the court's child support order. But until the daycare costs materialize, Patrick's claim that such expenses will drive his income below the poverty line is too speculative to adjudicate.

Patrick advances another paragraph R argument with regard to his duty to pay 80.5 percent of the children's medical, opthalmological, and orthodontic/dental care costs which are not covered by insurance and exceed $480 per year. As with daycare costs, such health care costs are also subject to paragraph R.[37]

In responding to Patrick's argument, we first note that Patrick's medical care obligation was mentioned only in the district court's original order of December 15, 2004. The

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[35] *Stuczynski v. Stuczynski*, 238 Neb. 368, 374, 471 N.W.2d 122, 126 (1991).

[36] *Rauch, supra* note 29, 256 Neb. at 261, 590 N.W.2d at 174.

[37] See, Nebraska Child Support Guidelines, paragraph R; *Kearney, supra* note 34.

court's subsequent order, issued in response to our remand, mysteriously lacks any such obligation. Further, the new order expressly states that the December 15 order is to remain in full effect "except for child support and alimony as redetermined herein." In our view, this means Patrick is not obligated to pay a proportional share of the children's health care costs, a result we believe may have been accidental. Nevertheless, we conclude that even if Patrick was obligated to pay for such health care costs, these costs, like the costs for daycare, are entirely speculative. It is therefore inappropriate for this court to determine whether the imposition of such costs would violate paragraph R at this time.

In sum, Patrick's monthly child support responsibility of $1,224 does not, by itself, violate paragraph R of the NCSG. Patrick's additional obligations—daycare and, potentially, health care—may drive his income below the poverty line. Because the costs associated with those obligations are speculative at this point, we hold that the district court's child support order was not an abuse of discretion.

(d) Social Security Benefits

Patrick next argues the district court erred in disregarding Social Security benefits paid on behalf of the youngest of the Gress children when calculating Patrick's child support obligation. To refresh, the youngest of the Gress children was born with Down syndrome. As a result, the child receives $564 per month in Social Security benefits from the federal government. Citing the Nebraska Court of Appeals' opinion in *Ward v. Ward*,[38] Patrick argues that his child support obligation should be reduced in light of the Social Security benefits.

In *Ward*, a child began receiving Social Security benefits after her adoptive mother passed away. The child's adoptive father remarried, and his second wife also adopted the child. At issue in *Ward* was whether the child's Social Security benefits should offset some of the money each parent owed in child support. The Court of Appeals held that it should offset child support, and it reduced the amount of each parent's obligation by a

[38] *Ward v. Ward*, 7 Neb. App. 821, 585 N.W.2d 551 (1998).

proportion of the Social Security payment equal to that parent's share of the child support needs.[39]

Patrick's suggestion that the same be done in this case would substantially reduce his obligation. The district court found the total support obligation of the Gress children to be $1,535 per month. Patrick, based on his income, is responsible for 79.75 percent of that sum, or $1,224. If the $564 in Social Security benefits is taken into account, the total support obligation for the Gress children would be reduced from $1,535 to $971. Patrick's 79.75-percent share would be $774.

In response to Patrick's request that we apply *Ward* to these facts, Pamela urges us to overrule that decision. We choose neither option. Instead, we hold that whatever merit *Ward* may have in other contexts, the case is not applicable here. For one, we note that *Ward* involved a single child. It seems far less appropriate to offset support obligations for *four* children in light of one child's Social Security benefits.

[17] Second, and more important, it is well established that children with actual disabilities like Down syndrome have special needs above and beyond the needs of most children.[40] All children have support needs, but special-needs children require additional financial support to overcome developmental, cognitive, or physiological problems. With this in mind, the federal government provides Social Security to such children with the intent that it will "supplement other income, not substitute for it."[41] In contrast, the money allocated to the youngest child under the NCSG is meant to provide for the basic needs all children have. To construe one source of money as satisfying both needs would leave either his basic or his special needs unfulfilled.

Ward, in contrast, did not present such a situation. Unlike a child with a disability, a child who loses a parent at a young age does not necessarily have special needs that will lead to increased support costs. In that context, Social Security benefits

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[39] *Id.*

[40] H.R. Rep. No. 92-231 (1971), 92d Cong., 2d Sess., *reprinted in* 1972 U.S.C.C.A.N. 4989.

[41] *Kyle v. Kyle*, 582 N.E.2d 842, 846 (Ind. App. 1991).

are intended to account for the fact that the child has lost a source of support for his or her basic needs. Using Social Security benefits to offset a portion of child support costs is not necessarily a problem under the circumstances presented by *Ward*. However, it is not appropriate to offset child support costs where, as here, the Social Security benefits are intended to mitigate the additional costs that accompany disabilities. As a result, the district court did not abuse its discretion when it disregarded the Social Security benefits.

2. Alimony

The remaining assignments of error concern the propriety of the district court's order that Patrick pay Pamela alimony of $1,000 per month for 60 months. Patrick questions the reasonableness of the amount, while Pamela agrees with the amount but argues that alimony should continue beyond 60 months.

(a) Amount

In his final assignment of error, Patrick contends the district court erred in awarding Pamela an unreasonable amount of alimony. His primary contention is that the alimony amount is unreasonable because paying alimony and child support would drive his income below the basic subsistence limitation expressed in paragraph R of the NCSG. Alternatively, Patrick argues that the district court's award is unreasonable under the circumstances.

[18] Ordinarily, the test for the propriety of an alimony award is whether it is reasonable in light of the parties' circumstances.[42] Patrick suggests that the amount of an alimony award should be regarded as presumptively unreasonable if it would drive a party's income below the poverty line. We agree.

Although paragraph R of the NCSG speaks only to child support, we are persuaded that the basic subsistence limitation in that paragraph should apply with equal force in the alimony context. As a purely logical matter, this conclusion is buttressed by the structure of the NCGS itself. As noted above, paragraph M of the NCSG mandates that alimony be drawn from whatever

[42] Neb. Rev. Stat. § 42-365 (Reissue 2004).

income is left *after* child support obligations have been determined.[43] Prioritizing child support over alimony indicates that of the two, child support is the more important support interest. So if child support cannot drive an obligor's income below the poverty line unless specifically warranted,[44] then a fortiori, alimony should also not be allowed to drive an obligor's income below the poverty line unless specifically warranted.

The idea that an alimony award may be regarded as unreasonably high if it impoverishes the obligor spouse finds some support from courts outside Nebraska.[45] Moreover, West Virginia has a statute discouraging alimony awards which, when combined with child support and other similar obligations, drive a party's income below the federal poverty line.[46] We read these authorities as providing some support for our conclusion that an alimony award which drives the obligor's income below the basic subsistence limitation set forth in paragraph R of the NCSG is an abuse of judicial discretion unless the court specifically finds that such an award is warranted based on the evidence.

[19] To be clear, our holding on alimony should be read as a mirror of our holding on child support under paragraph R. As such, we believe an alimony award which drives an obligor's net income below the basic subsistence limitation of paragraph R is presumptively an abuse of judicial discretion unless the court specifically finds that conformity with paragraph R would work an "unjust or inappropriate" result in that particular case.[47]

Of course, the parallel between child support and alimony awards means that an obligor's "income" available for alimony purposes is not necessarily synonymous with taxable income.[48] As such, a deviation from the limitation in paragraph R may

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[43] Nebraska Child Support Guidelines, paragraph M.

[44] *Sears, supra* note 31.

[45] See, e.g., *Moore v. Moore*, 242 Mich. App. 652, 619 N.W.2d 723 (2000) (per curiam); *Quick v. Quick*, 305 N.C. 446, 290 S.E.2d 653 (1982).

[46] W. Va. Code Ann. § 48-13-702(b)(8) (LexisNexis 2004).

[47] Nebraska Child Support Guidelines, paragraph C(5).

[48] *Gress, supra* note 1.

be warranted in cases where the obligor spouse's gross income could support the court's preferred alimony award even if his or her taxable income would not. In sum, if the combination of child support and alimony obligations would reduce an obligor's *net* income below the basic subsistence limitation in paragraph R, the trial court must make specific findings of fact that the obligor is capable of paying that amount despite his reported income on tax returns. If such findings are made, the court may award alimony in excess of what would otherwise be allowed under the limit in paragraph R. This, of course, is but one example of a way in which the application of paragraph R's limitation may be inappropriate in a particular case.

After accounting for his monthly child support obligation, Patrick is left with a net income of $1,433.85 per month. The district court's alimony award of $1,000 per month leaves Patrick with a net income of $433.85. This figure is $417.15 below the current poverty line in paragraph R. The district court's order, however, lacks a specific explanation of why an alimony award that goes beyond the limit set in paragraph R is warranted. Therefore, under our holding today, the district court's alimony award would appear to be an abuse of discretion.

Of course, the district court could not have anticipated our decision. As such, the lack of a specific declaration that an alimony award of $1,000 is warranted despite its conflict with the limit in paragraph R does not necessarily mean it is not warranted. It may simply mean that the district court did not make such a finding express because, at the time of its order, it was not necessary to do so. Accordingly, we think it prudent to remand this cause back to the trial court so that it may have the opportunity to determine whether an alimony award beyond the limit set forth in paragraph R is warranted. If not, the district court should award Pamela no more than $582.85 per month in alimony.

Because the district court may have abused its discretion by ordering an alimony award that contravenes the basic subsistence limitation of paragraph R, we need not address Patrick's alternative argument that the alimony award is unreasonable under the circumstances.

(b) Duration

[20,21] In her cross-appeal, Pamela argues that the district court erred in terminating her alimony award after 60 months. The primary purpose of alimony is to assist an ex-spouse for a period of time necessary for that individual to secure his or her own means of support.[49] Above all else, the duration of an alimony award must be reasonable in light of this purpose.[50]

It would be difficult to say on this record, however, that the district court abused its discretion when it concluded that Pamela will be able to secure sufficient employment after 5 years. Although Pamela disputes that conclusion, she fails to articulate any reason why it is false.

Indeed, in the section of her brief dedicated to a discussion of the alimony award's duration, Pamela merely advances arguments concerning the *amount* of alimony. Pamela never points to evidence in the record which supports the idea that 5 years will not provide sufficient time for her to establish gainful employment. As a result, Pamela has failed to carry her burden to show that limiting alimony to a period of 5 years was an abuse of the district court's discretion.

VI. CONCLUSION

We conclude that the district court did not abuse its discretion in ordering Patrick to pay $1,224 per month in child support. Specifically, it was not an abuse of discretion to use a 3-year average to calculate Patrick's income for child support purposes. Moreover, the district court did not abuse its discretion when it excluded Patrick's income from 2004 in its income average. Although Patrick's additional child support obligations may eventually cause his income to drop below the poverty line of paragraph R, we cannot say that such obligations violate that provision at this juncture. Finally, it was not an abuse of discretion to disregard the youngest child's Social Security benefits when calculating Patrick's child support obligation.

With regard to the court's alimony award, the district court did not abuse its discretion when it limited Pamela's alimony

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[49] *Kimbrough v. Kimbrough*, 228 Neb. 358, 422 N.W.2d 556 (1988).

[50] See *Bowers v. Lens*, 264 Neb. 465, 648 N.W.2d 294 (2002).

award to a period of 60 months. It appears, however, that it was a potential abuse of discretion to order Patrick to pay alimony which will drive his net income below the current basic subsistence limitation set forth in paragraph R of the NCSG. To resolve that potential, we remand the cause back to the trial court so that it may determine whether such an alimony award is specifically warranted by the evidence.

As a result, we reverse the district court's alimony award and remand the cause with directions to enter a monthly alimony award of $582.85 per month for 60 months unless the evidence warrants an upward deviation. On remand, the district court should also clarify (1) whether Patrick's actual share of daycare is 79.75 percent or 80.5 percent and (2) whether Patrick is accountable for the same proportion—79.75 percent—of the children's health care costs not covered by insurance and which exceed $480.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

NANCI A. MEISTER, APPELLEE, AND KEVIN V. SCHLENDER, APPELLANT, V. JOHN C. MEISTER, APPELLEE.

742 N.W.2d 746

Filed December 21, 2007. No. S-06-873.

1. **Attorneys' Liens.** Under Nebraska law, the proper method for enforcing an attorney's charging lien is by resort to equity, because such a lien is equitable in nature.
2. **Equity: Appeal and Error.** On appeal from an equity action, an appellate court decides factual questions de novo on the record; for questions of both fact and law, the appellate court determines the issues independently of the trial court's determination.
3. **Jurisdiction: Time: Notice: Appeal and Error.** To vest an appellate court with jurisdiction, a party must timely file a notice of appeal.
4. **Motions for New Trial: Time: Notice: Appeal and Error.** A motion for a new trial terminates the time in which a notice of appeal must be filed; a party has 30 days from the entry of an order denying the motion for a new trial to file a notice of appeal.
5. **Attorneys' Liens: Notice.** Nebraska law does not require an attorney to file notice of an attorney's lien before his or her discharge.
6. **Attorneys' Liens: Interventions.** The proper method of enforcing an attorney's lien in the original action is by intervention.

7. **Interventions.** To be filed as a matter of right, a petition in intervention under Neb. Rev. Stat. § 25-328 (Cum. Supp. 2006) must be filed before the trial.
8. **Interventions: Equity.** Intervention under Neb. Rev. Stat. § 25-328 (Cum. Supp. 2006) is a matter of right, but does not prevent a court of equity in the interests of justice from allowing a proper party to intervene after the trial has begun.

Appeal from the District Court for York County: ALAN G. GLESS, Judge. Reversed and remanded.

Kevin V. Schlender, pro se.

Bruce E. Stephens for appellee Nanci A. Meister.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

CONNOLLY, J.

Kevin V. Schlender appeals the district court's order that his attorney's lien was unenforceable under Neb. Rev. Stat. § 7-108 (Reissue 1997). Schlender represented Nanci A. Meister in her divorce from John C. Meister. After John appealed the court's divorce decree, Nanci discharged Schlender and hired new counsel. A month later, Schlender filed notice of his attorney's lien.

After the appeal, John paid money into the district court to satisfy the judgment against him, and the court held a hearing on Schlender's attorney's lien. Nanci objected to the lien because she had dismissed Schlender before he filed notice of the lien. The court determined that Schlender's lien was unenforceable. We reverse, because Schlender's failure to file his lien before his discharge did not affect the enforceability of the lien.

BACKGROUND

The district court entered the Meisters' divorce decree on September 12, 2003. An amended decree awarded Nanci $38,153.42 as judgment to equalize the property division. Schlender withdrew from the case on November 7, and on December 15, he filed notice of his attorney's lien with the district court. He sent a copy of the notice to both Nanci and John. The notice provided that the lien was for $9,115.25, "which is the unpaid balance of compensation due from [Nanci] to [Schlender] for representation in the [divorce] action."

The Court of Appeals modified the judgment, reducing it to $32,348.94.[1] John satisfied the $32,348.94 judgment in part by paying $12,348.94 into the district court on April 21, 2006. On April 24, the court scheduled a May 1 hearing to address the attorney's lien. On April 27, Nanci filed an objection to the lien, arguing that she had dismissed Schlender and hired new counsel before Schlender filed his attorney's lien.

At the hearing, the court received an exhibit that included Schlender's affidavit and an attached statement for services. The statement showed that the amount owed was $9,115.25. The court took judicial notice of trial procedures in the underlying dissolution case, the exhibit list in that case, and the notice of the attorney's lien. Schlender argued that the attorney's lien statute did not require him to file the lien while he was representing Nanci. He asked the court to direct the clerk to pay him the balance due for his services.

On May 15, 2006, the court declared the attorney's lien "unenforceable under the lien statute." On May 23, Schlender moved to intervene "to determine the disposition of the settlement proceeds paid into the Court by [John] which are subject to the attorney's lien." The same day, Schlender also moved for new trial. After a hearing on July 10, the court overruled Schlender's motion for new trial. The court denied intervention on July 19. Schlender filed a notice of appeal on August 8.

ASSIGNMENT OF ERROR

Schlender assigns, restated, that the court erred in deciding the attorney's lien was unenforceable under the lien statute.

STANDARD OF REVIEW

[1,2] Under Nebraska law, the proper method for enforcing an attorney's charging lien is by resort to equity, because such a lien is equitable in nature.[2] On appeal from an equity action, we decide factual questions de novo on the record. For questions of

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[1] *Meister v. Meister*, No. A-03-1157, 2005 WL 625888 (Neb. App. Mar. 1, 2005) (not designated for permanent publication).

[2] *Kleager v. Schaneman*, 212 Neb. 333, 322 N.W.2d 659 (1982).

both fact and law, we determine the issues independently of the trial court's determination.[3]

ANALYSIS

JURISDICTIONAL QUESTION

[3,4] Nanci contends that Schlender did not timely file his appeal. To vest an appellate court with jurisdiction, a party must timely file a notice of appeal.[4] A party must file a notice of appeal within 30 days of the judgment, decree, or final order from which the party is appealing.[5] A motion for a new trial, however, terminates the time in which a notice of appeal must be filed.[6] And, if the court denies the motion, the party has 30 days from the entry of the order denying the motion to file a notice of appeal.[7]

The district court declared the attorney's lien unenforceable on May 15, 2006. Schlender moved for new trial on May 23, and the court overruled the motion on July 10. Schlender filed his notice of appeal on August 8. Nanci argues that because there was no trial regarding the attorney's lien, the motion for new trial was "spurious" and that therefore, the motion did not terminate the time for filing notice of appeal.[8]

"Trial" is defined as "a judicial examination of the issues, whether of law or of fact in an action."[9] The court's hearing on May 1, 2006, constituted a "trial" on the issue of Schlender's attorney's lien. The court received evidence, heard arguments by the parties, and, on May 15, resolved the issue by declaring the lien unenforceable. Because there was a trial, Schlender

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[3] See *County of Sarpy v. City of Gretna*, 273 Neb. 92, 727 N.W.2d 690 (2007).

[4] See *DeBose v. State*, 267 Neb. 116, 672 N.W.2d 426 (2003).

[5] Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006).

[6] § 25-1912(3).

[7] *Strong v. Omaha Constr. Indus. Pension Plan*, 270 Neb. 1, 701 N.W.2d 320 (2005).

[8] Brief for appellee Nanci Meister at 4.

[9] Neb. Rev. Stat. § 25-1103 (Reissue 1995).

properly moved for new trial within 10 days, terminating the time for filing a notice of appeal. Nanci's argument fails.

Schlender's Failure to File Notice of the Lien Before His Discharge Did Not Affect the Enforceability of the Lien

Nebraska's attorney's lien statute, § 7-108, provides:

> An attorney has a lien for a general balance of compensation upon any papers of his client which have come into his possession in the course of his professional employment; and upon money in his hands belonging to his client, and *in the hands of the adverse party in an action or proceeding in which the attorney was employed from the time of giving notice of the lien to that party*.[10]

Before the hearing on Schlender's attorney's lien, Nanci objected to the lien because she dismissed Schlender before he filed his notice of the lien. Apparently based on Nanci's objection, the district court declared Schlender's lien unenforceable.

Schlender contends that the court erred in finding that his attorney's lien was unenforceable because he did not file it with the court before his discharge. He argues that the statute does not mandate that an attorney file the attorney's lien before discharge by his client. Nanci argues that Schlender's lien was unenforceable because he filed his notice of the lien after he had been discharged and because Nanci objected to the lien.

Nanci relies on *Gordon v. Hennings*.[11] In *Gordon*, an attorney represented a plaintiff in an action against a city. While in the course of his representation, the attorney acquired possession of warrants payable by the city to the plaintiff for $1,600. After obtaining possession of the warrants, the attorney asserted a lien for $1,400, which he claimed was for legal services rendered in the litigation. The plaintiff later discharged the attorney and specifically instructed him not to collect the warrants from the city. Nevertheless, the attorney proceeded to redeem the

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[10] § 7-108 (emphasis supplied).

[11] *Gordon v. Hennings*, 89 Neb. 252, 131 N.W. 228 (1911).

warrants and collected the money from the city treasurer. The *Gordon* court explained that the attorney's discharge

> did not dissolve the lien which the law gave [the attorney] upon the money in the city's possession, [or] destroy his equitable right to so much of the fund as might be necessary to satisfy that lien, but [the discharge] withdrew the attorney's authority to collect the money over his client's objection.[12]

[5] Contrary to Nanci's assertion, *Gordon* does not hold that once a client discharges an attorney, the attorney is no longer entitled to a lien absent his client's approval. Instead, the court expressly recognized that the attorney's discharge did not dissolve the lien or destroy his right to money that would satisfy the lien. The discharge simply withdrew his authority to collect on warrants that were drawn to the plaintiff's order. In other words, once the plaintiff discharged the attorney, the attorney no longer had authority to act on the plaintiff's behalf to "cash in" the warrants over the plaintiff's objections; however, he still had a right to the money satisfying the lien. The *Gordon* court did not hold that an attorney must file an attorney's lien before the attorney's discharge. The rule Nanci suggests would encourage improper discharge to avoid paying attorney fees. Therefore, Schlender's failure to file notice of the lien before his discharge did not affect the lien's enforceability. The court erred in declaring his lien unenforceable.

Equity Excuses Schlender's Failure to Intervene Before the Hearing

Nanci contends that Schlender did not use the proper procedure for preserving the lien. She argues that to enforce his lien, Schlender had to file a petition to intervene. Nanci claims that by arguing his lien on May 1, 2006, and only later moving to intervene on May 23—after the court declared the lien unenforceable—Schlender put the "proverbial cart before the horse."[13]

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[12] *Id.* at 255, 131 N.W. at 229.

[13] Brief for appellee Nanci Meister at 5.

[6,7] The proper method of enforcing an attorney's lien in the original action is by intervention.[14] Neb. Rev. Stat. § 25-328 (Cum. Supp. 2006) provides that a person who has an interest in the matter may intervene "before the trial commences." We have stated that to be filed as a matter of right, a petition in intervention under § 25-328 must be filed before the trial.[15] Here, the court held a hearing on the attorney's lien on May 1, 2006, and declared the lien unenforceable on May 15. Schlender did not move to intervene until May 23. Arguably, he did not follow the proper procedure to enforce his lien.

[8] Despite Schlender's failure to properly intervene before the hearing, this failure did not destroy any entitlement he may have had to the lien. We have stated that "'"[i]ntervention under [§ 25-328] is a matter of right, but does not prevent a court of equity in the interests of justice from allowing a proper party to intervene after the trial has begun. . . ." . . .'"[16] We further stated:

> "'"Leave to intervene after the entry of a final decree is not allowable as a matter of right and should seldom be granted, but equity sometimes requires a departure from the general rule. . . . 'Applications for leave to intervene after entry of a final decree are unusual, and generally have been denied. There are instances, however, where petitions for leave to intervene have been filed and granted after decree.' . . ." . . .'"[17]

As noted above, the proper method for enforcing an attorney's charging lien under Nebraska law is by resort to equity.[18] In the present case, equity requires a departure from the general rule that intervention cannot occur after entry of a final decree. Or, stated another way, equity requires a finding that Schlender

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[14] See, *Barber v. Barber*, 207 Neb. 101, 296 N.W.2d 463 (1980); *Tuttle v. Wyman*, 149 Neb. 769, 32 N.W.2d 742 (1948).

[15] *Kirchner v. Gast*, 169 Neb. 404, 100 N.W.2d 65 (1959).

[16] *State ex rel. City of Grand Island v. Tillman*, 174 Neb. 23, 27, 115 N.W.2d 796, 799 (1962) (quoting *Kitchen Bros. Hotel Co. v. Omaha Safe Deposit Co.*, 126 Neb. 744, 254 N.W. 507 (1934)).

[17] *Id.* (citations omitted).

[18] See *Kleager v. Schaneman, supra* note 2.

could intervene after the hearing, and his failure to intervene before the hearing did not destroy any right he may have had to the lien.

Equity requires such a result because of the small window of time in which Schlender had to intervene before the hearing. John made his payment to the court on April 21, 2006, a Friday. The following Monday, April 24, the court ordered a show cause hearing for May 1. Recently, in *Stover v. County of Lancaster*,[19] we noted that once a judgment debtor paid funds to the court, the clerk should have notified the parties claiming an interest in the funds, and "intervention by [the attorney] at that point . . . would have been appropriate." Here, the court apparently gave Schlender notice of John's payment on April 24 when it ordered the hearing for May 1. This gave Schlender exactly 1 week—5 business days—to intervene before the hearing. Given this small window, equity permits Schlender to intervene after the court's disposition of the matter, which Schlender tried to do on May 23, 8 days after the court declared his lien unenforceable. Therefore, contrary to Nanci's argument, Schlender's failure to intervene before arguing his lien at the hearing did not destroy any entitlement he may have had to the lien.

CONCLUSION

Schlender's filing of the lien after his discharge did not affect the enforceability of the lien. Therefore, the district court erred in declaring Schlender's lien unenforceable. And although intervention is the proper method of enforcing an attorney's lien in an original action, equity excuses Schlender's failure to intervene before the trial. On remand, we leave it to the district court to decide whether Schlender attached and perfected his lien. If so, the court should then determine the amount of the lien. We reverse, and remand.

REVERSED AND REMANDED.

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[19] *Stover v. County of Lancaster*, 271 Neb. 107, 115, 710 N.W.2d 84, 90 (2006).

IN RE INTEREST OF DESTINY A. ET AL., CHILDREN UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V.
WENDY A., APPELLANT.

742 N.W.2d 758

Filed December 21, 2007. No. S-06-1380.

1. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law.
2. **Judgments: Appeal and Error.** When an appellate court reviews questions of law, it resolves the questions independently of the lower court's conclusions.
3. **Juvenile Courts: Appeal and Error.** Juvenile cases are reviewed de novo on the record, and an appellate court reviews the issues independently of the lower court's findings.
4. **Statutes: Legislature: Intent.** For a court to inquire into a statute's legislative history, the statute in question must be open to construction, and a statute is open to construction when its terms require interpretation or may reasonably be considered ambiguous.
5. **Statutes.** A statute is ambiguous when the language used cannot be adequately understood either from the plain meaning of the statute or when considered in pari materia with any related statutes.
6. **Parental Rights: Adoption.** When deciding whether to terminate parental rights, a court should not consider that an adoptive family has been identified.
7. **Parental Rights: Trial: Evidence: Appeal and Error.** The improper admission of evidence in a parental rights termination proceeding is not, in and of itself, reversible error; as long as the appellant properly objected at trial, the Supreme Court will not consider the evidence in a de novo review of the record.
8. **Parental Rights: Rules of Evidence: Due Process.** The Nebraska Evidence Rules do not apply in cases involving the termination of parental rights. Instead, due process controls and requires that the State use fundamentally fair procedures in an attempt to prove that a parent's rights to his or her child should be terminated.
9. ____: ____: ____. In determining whether admission or exclusion of particular evidence in a parental rights termination case would violate fundamental due process, the Nebraska Evidence Rules serve as a guidepost.
10. **Parental Rights: Evidence: Proof.** Before parental rights may be terminated, the evidence must clearly and convincingly establish the existence of one or more of the statutory grounds permitting termination and that termination is in the juvenile's best interests.
11. **Parental Rights.** Where a parent is unable or unwilling to rehabilitate himself or herself within a reasonable time, the best interests of the child require termination of the parental rights.
12. ____. Children cannot, and should not, be suspended in foster care or be made to await uncertain parental maturity.

Petition for further review from the Court of Appeals, IRWIN, CARLSON, and MOORE, Judges, on appeal thereto from the Separate

Juvenile Court of Douglas County, ELIZABETH G. CRNKOVICH, Judge. Judgment of Court of Appeals affirmed.

Thomas C. Riley, Douglas County Public Defender, and Mona L. Burton for appellant.

Eric Strovers, Deputy Douglas County Attorney, for appellee.

Thomas G. Incontro and Shawntal M. Smith, of Thomas G. Incontro, P.C., L.L.O., guardians ad litem.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

CONNOLLY, J.

We granted Wendy A.'s petition for further review of a Nebraska Court of Appeals' memorandum opinion and judgment on appeal filed on May 24, 2007. The Court of Appeals affirmed the separate juvenile court's decision terminating Wendy's parental rights to her three children under Neb. Rev. Stat. § 43-292 (Reissue 2004). We granted Wendy's petition to clarify an inconsistency between case law and Neb. Rev. Stat. § 43-292.02(2) (Reissue 2004). That statute states that a court deciding whether to terminate parental rights should not consider that an adoptive family has been identified. We conclude that under § 43-292.02(2), a juvenile court, in terminating parental rights, cannot consider whether an adoptive family has been identified. Although the juvenile court erroneously considered the foster parents' willingness to adopt, we disregard that evidence in our de novo review. We conclude the guardian ad litem presented other clear and convincing evidence that terminating Wendy's parental rights is in the children's best interests. We affirm.

BACKGROUND

Wendy is the natural mother of the following minor children: Vincent R., Jr., born July 6, 1998; Destiny A., born March 19, 2002; and Antonio A., born January 21, 2003. The court removed all three children from Wendy's care and placed

them in the custody of the Nebraska Department of Health and Human Services (DHHS).

The day after Destiny's birth, the court placed her in DHHS' custody. An affidavit attached to the motion for temporary custody stated Wendy tested positive for drugs at Destiny's delivery and had admitted to using marijuana weekly during her pregnancy. Destiny has remained in out-of-home placement since the day of her birth. About 3 weeks later, on April 10, 2002, the court determined that she was a child in need of special supervision.

On January 8, 2003, the State moved for temporary custody of Vincent. An affidavit stated that Wendy had admitted to using methamphetamine and marijuana while pregnant with Destiny; she had admitted to using marijuana since Destiny's removal; she had not complied with the court's orders relating to Destiny's case; she had tested positive for methamphetamine on two separate occasions since Destiny's removal; and she continued to use illegal drugs even though she was 7 months pregnant. The court issued an order for immediate custody. Vincent has remained in out-of-home placement since then.

Antonio has been in out-of-home custody since January 22, 2003, the day after his birth. An affidavit attached to the motion for temporary custody stated that Wendy's maternal drug screen tested positive for amphetamines, barbiturates, cocaine, and cannabinoids. On April 17, the court determined that Antonio and Vincent were children in need of special supervision.

Wendy's Parental Rights Are Terminated

In November 2004, the State moved to terminate Wendy's parental rights. In May 2005, however, the State moved to dismiss the motion for termination. The court granted the motion to dismiss and dismissed the State's motion with prejudice.

However, in May 2006, the children's guardian ad litem moved to terminate Wendy's parental rights. The guardian ad litem alleged that the court should terminate Wendy's parental rights under § 43-292(2), (3), (6), and (7), and that it was in the children's best interests.

The guardian ad litem called each child's current foster mother to testify. Destiny's foster mother testified, over Wendy's objection, that Destiny usually stated she did not want to attend scheduled visits with Wendy. The court also overruled Wendy's objection when Destiny's foster mother testified that if Destiny became free for adoption, she would be willing to provide care and support for her. The court also allowed Antonio's foster mother to testify that Antonio tells her he does not want to go on visits with Wendy. Wendy also objected when Antonio's foster mother testified that she and her husband would be willing to provide Antonio a loving home if he became available for adoption. The court overruled Wendy's objection.

The director of Destiny and Antonio's daycare testified that she sometimes observed Destiny right before a visitation with Wendy and that Destiny was usually withdrawn. Destiny would cling to the daycare personnel and say she did not want to go on the visit. The daycare director stated this was the same for Antonio. The case manager testified that when she observed visits between Wendy and the children, she noticed Destiny and Antonio did not seem excited to be there.

Other testimony showed Wendy had generally complied with the case plan and continued to make progress. Witnesses reported that during visits with the children, Wendy was affectionate and nurturing. The family's case manager from June 2004 through February 2006 testified that Wendy had submitted to random urinalysis screenings, which were negative. She further stated she had no concerns that Wendy was using drugs or alcohol during that time.

But evidence established that Wendy's April 26, 2006, urinalysis was positive for methamphetamine. After the positive test, a case manager sent Wendy two letters, the first requesting she complete a urinalysis on May 25, and the second requesting two more urinalysis screenings in June. Wendy did not comply with these requests.

Evidence also showed Wendy missed individual therapy sessions at about the same time. She attended six sessions from March to May 2006, but she missed the next six sessions. Although she gave the therapist reasons for missing three of the sessions, the other three missed sessions were "no-shows."

On November 6, 2006, the juvenile court terminated Wendy's parental rights. The court found by clear and convincing evidence that grounds existed under § 43-292(2), (3), (6), and (7) for termination. The court also decided that termination was in the children's best interests and denied Wendy's motion for continued visitation.

Court of Appeals' Decision

Wendy appealed the juvenile court's decision to the Court of Appeals. Wendy assigned 13 errors. Wendy made the following claims: (1) the court erred in overruling her relevance objections to testimony that the foster parents were willing to adopt Destiny and Antonio, (2) the court erred in overruling her objections to the foster mothers' testimony that the children did not want to attend visits with Wendy, and (3) the court erred in finding that terminating Wendy's parental rights was in the best interests of the children.

Wendy claimed that under § 43-292.02, testimony that foster parents are willing to adopt the child should have no bearing in a termination of parental rights hearing. The Court of Appeals decided the lower court did not err in overruling Wendy's objections to the foster parents' testimony. The Court of Appeals concluded that "[s]uch evidence is necessary to show that termination of a parent's rights is in the children's best interests, specifically that the children would be provided with more permanency than they would have otherwise."

Wendy also argued the court violated her due process rights when it overruled her hearsay objections and allowed the foster mothers to testify that Destiny and Antonio stated they did not want to go on visits. The Court of Appeals noted that Wendy's counsel cross-examined both foster mothers and that other evidence showed the children's reactions to visitation. The court concluded the totality of the record showed Wendy was afforded due process regarding the testimony about the children's statements.

Finally, Wendy argued that termination was not in the children's best interests because Wendy and the children had a "positive relationship" and because she complied with the

rehabilitation plan.[1] Wendy claimed that she had made "great strides in turning her life around, remaining drug free and placing herself in a position to parent her children."[2] The Court of Appeals concluded that the lower court did not err in finding that the termination of Wendy's parental rights was in the children's best interests. The Court of Appeals relied on evidence that the children had not returned to Wendy's care since their removal; that Wendy tested positive for drugs in April 2006; that her visitation and therapy attendance became more sporadic around that time; that the children have been in stable, loving foster homes; and that two of the children will likely be adopted by their foster families.

The Court of Appeals concluded there existed clear and convincing evidence to support a finding that Wendy's parental rights should be terminated under § 43-292(7) and that termination was in the children's best interests. The court affirmed the order terminating Wendy's parental rights. We granted Wendy's petition for further review.

ASSIGNMENTS OF ERROR

Wendy assigns, restated, that the Court of Appeals erred in (1) deciding the juvenile court properly allowed the foster mothers' testimony regarding their willingness to adopt the children, (2) determining that Wendy's due process rights were sufficiently protected even though the foster mothers were allowed to testify about the children's statements regarding visitation, and (3) deciding that the termination of Wendy's parental rights is in the children's best interests.

STANDARD OF REVIEW

[1,2] Statutory interpretation presents a question of law.[3] When we review questions of law, we resolve the questions independently of the lower court's conclusions.[4]

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[1] Brief for appellant at 40.

[2] *Id.* at 42.

[3] *Zach v. Eacker*, 271 Neb. 868, 716 N.W.2d 437 (2006).

[4] See *id.*

[3] Juvenile cases are reviewed de novo on the record, and we review the issues independently of the lower court's findings.[5]

ANALYSIS

The Court of Appeals Erred in Deciding That Testimony Regarding the Foster Parents' Willingness to Adopt the Children Was Admissible

Section 43-292.02(2) provides, in part, "The fact that a qualified family for an adoption of the juvenile has been identified, recruited, processed, and approved shall have no bearing on whether parental rights shall be terminated." Wendy argued to the Court of Appeals that under § 43-292.02(2), the juvenile court erred in allowing the foster mothers to testify that they were willing to adopt the children.

[4,5] In interpreting § 43-292.02, we look to the statute's legislative history. For a court to inquire into a statute's legislative history, the statute in question must be open to construction. A statute is open to construction when its terms require interpretation or may reasonably be considered ambiguous.[6] A statute is ambiguous when the language used cannot be adequately understood either from the plain meaning of the statute or when considered in pari materia with any related statutes.[7]

The relevant provision in § 43-292.02(2) is ambiguous. Section 43-292.02 addresses the State's duty to file a petition to terminate parental rights. Subsection (1) identifies cases in which the State has a duty to file a petition. Subsection (2) provides:

> A petition shall not be filed on behalf of the state to terminate the parental rights of the juvenile's parents or, if such a petition has been filed by another party, the state shall not join as a party to the petition if the sole factual basis for the petition is that (a) the parent or parents of the juvenile are financially unable to provide health care for the juvenile or (b) the parent or parents of the juvenile are incarcerated. The fact that a qualified family for

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[5] *See In re Interest of Xavier H., ante* p. 331, 740 N.W.2d 13 (2007).

[6] *Zach v. Eacker, supra* note 3.

[7] *Id.*

> an adoption of the juvenile has been identified, recruited, processed, and approved shall have no bearing on whether parental rights shall be terminated.

The inclusion of the second sentence in subsection (2) creates an ambiguity. When considering the statute as a whole, it is unclear whether the relevant language applies only in those cases identified in the first sentence of subsection (2), or whether it applies in all parental rights termination cases. Here, the petition's factual basis is not one of those identified in subsection (2). Thus, the relevant language is inapplicable if it applies only in cases falling within subsection (2). Because the provision is ambiguous, the statute is open to construction.

The Legislature enacted § 43-292.02 through 1998 Neb. Laws, L.B. 1041. The legislative history for L.B. 1041 suggests the relevant provision appears in subsection (2) because all the provisions now appearing in subsection (2) were added by a single amendment to the bill.[8] We do not believe the provision's application is limited to those cases in subsection (2). The amendment's introducer explained the purpose of the provision:

> And then the third matter that's covered by this amendment is that the fact that an adoptive family has been identified or recruited should not be a fact considered by the court in determining whether parental rights are terminated. And that really is clear to any judge, I think, that you . . . the court has to make a determination on parental rights based upon the facts of that case, not whether somebody is willing to adopt the child or not. That's the second step. First you deal with the criteria of law in determining whether parental rights should be terminated. After that has been treated, if parental rights are terminated, then you go to the next step and you proceed with the adoption.[9]

This explanation does not limit the provision's application to only those cases appearing in the first sentence of subsection (2). Instead, the provision applies in all parental rights termination cases, including the one currently before us.

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[8] Floor Debate, 95th Leg., 2d Sess. 13122 (Mar. 10, 1998).

[9] *Id.* at 13122-23.

[6,7] Section 43-292.02(2) expressly provides that when deciding whether to terminate parental rights, a court should not consider that an adoptive family has been identified. The Court of Appeals erroneously decided the juvenile court did not err in allowing the foster mothers to testify about their willingness to adopt the children. The Court of Appeals further erred in considering this evidence when it decided that terminating Wendy's parental rights was in the best interests of the children. The court's error, however, is not a reversible error because Wendy properly objected at trial, and we will not consider this testimony in our de novo review of the best interests issue.[10]

In the recent case of *In re Interest of Phoenix L.*,[11] although the appellant did not raise the issue, in determining that termination of parental rights was in the children's best interests, we noted that the children's foster family wished to adopt the children. To the extent we relied on this evidence, we disapprove of that language.

The Court of Appeals Did Not Err in Deciding Wendy's Due Process Rights Were Sufficiently Protected

The juvenile court allowed Destiny's and Antonio's foster mothers to testify that the children had stated they did not want to go on visits with Wendy. Wendy contends that the Court of Appeals erred in determining that her due process rights were sufficiently protected when the juvenile court allowed this testimony. She argues the statements were hearsay. The Court of Appeals decided, based on the totality of the record, that Wendy was afforded due process regarding the receipt of the foster mothers' testimony. The court noted that Wendy's counsel cross-examined both foster mothers. The court also noted that other witnesses provided evidence of the children's reactions to visitation and that Wendy did not assign as error their testimony.

[8,9] The Nebraska Evidence Rules do not apply in cases involving the termination of parental rights.[12] Instead, due

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[10] See *In re Interest of D.S. and T.S.*, 236 Neb. 413, 461 N.W.2d 415 (1990).

[11] *In re Interest of Phoenix L.*, 270 Neb. 870, 708 N.W.2d 786 (2006).

[12] *In re Interest of Rebecka P.*, 266 Neb. 869, 669 N.W.2d 658 (2003).

process controls and requires that the State use fundamentally fair procedures before a court terminates parental rights.[13] In determining whether admission or exclusion of particular evidence would violate fundamental due process, the Nebraska Evidence Rules serve as a guidepost.[14]

But even if we were to determine that the foster mothers' testimony was inadmissible hearsay, any error on the part of the juvenile court was harmless.[15] The director for Destiny and Antonio's daycare and the family's DHHS case manager both testified about Destiny's and Antonio's reactions to visitation. Wendy did not assign as error the admission of their testimony. As we stated in *In re Interest of Gloria F.*,[16] "'[A]ny error in receiving the [testimony] was not fatal to the juvenile court's determination [because] [t]he court had before it other evidence, in the form of testimony and exhibits . . . sufficient to sustain the order of termination.'" Even if the court had excluded the foster mothers' testimony, the court still would have been aware of the children's reactions to visitation. Therefore, we need not determine whether the testimony was inadmissible. The Court of Appeals did not err in deciding Wendy's due process rights were sufficiently protected.

The Court of Appeals Did Not Err in Determining That the Termination of Wendy's Parental Rights Was in the Children's Best Interests

Wendy contends the Court of Appeals erred in deciding that terminating her parental rights was in the children's best interests. Wendy argues that "[t]ermination of parental rights is only appropriate as a last resort, not simply because there appears to be a more attractive alternative for the children or because the court reasonably believes that some other person could

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[13] *Id.*

[14] See, *In re Interest of Kassara M.*, 258 Neb. 90, 601 N.W.2d 917 (1999); *In re Interest of Floyd B.*, 254 Neb. 443, 577 N.W.2d 535 (1998).

[15] See *In re Interest of Gloria F.*, 254 Neb. 531, 577 N.W.2d 296 (1998).

[16] *Id.* at 538, 577 N.W.2d at 302 (quoting *In re Interest of R.A.*, 226 Neb. 160, 410 N.W.2d 110 (1987), *overruled on other grounds, In re Interest of J.S., A.C., and C.S.*, 227 Neb. 251, 417 N.W.2d 147 (1987)).

better provide for the child."[17] Wendy asserts that the Court of Appeals incorrectly relied on the relationship between the children and their foster parents as a reason to affirm the juvenile court's decision. She claims that she and the children have a "positive relationship" and that she has complied with the plan of rehabilitation.

[10,11] Before parental rights may be terminated, the evidence must clearly and convincingly establish one or more of the statutory grounds permitting termination and that termination is in the juvenile's best interests.[18] We have held that where a parent is unable or unwilling to rehabilitate himself or herself within a reasonable time, the best interests of the child require termination of the parental rights.[19] The State removed the children from Wendy's care because of her illegal drug use. Therefore, her testing positive for methamphetamine in April 2006 is particularly worrisome. Also, we cannot ignore that a case manager sent Wendy letters requesting she complete three additional drug tests after the April test, but Wendy failed to comply with the requests. About the same time, Wendy missed three therapy sessions without giving a reason for her absences.

[12] Wendy correctly asserts that termination of parental rights should be a last resort.[20] Yet, the system has run out of options. It has extended a helping hand. But by testing positive for methamphetamine in April 2006, missing three subsequent drug tests, and failing to appear for her therapy sessions, she has shown that she is unwilling or unable to rehabilitate herself. When the court terminated Wendy's parental rights, Vincent had been in foster care for 3 years. Destiny and Antonio had spent their entire lives, 4 years and 3 years, in foster care. The system cannot and should not allow children to languish in

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[17] Memorandum brief for appellant in support of petition for further review at 6.

[18] See *In re Interest of Xavier H., supra* note 5.

[19] *In re Interest of DeWayne G. & Devon G.,* 263 Neb. 43, 638 N.W.2d 510 (2002).

[20] See *In re Interest of Xavier H., supra* note 5.

foster care waiting to see if the parent will mature.[21] After a de novo review of the record, we conclude there exists clear and convincing evidence that terminating Wendy's parental rights is in the children's best interests. The Court of Appeals did not err in affirming the lower court's decision.

CONCLUSION

The Court of Appeals erroneously decided the juvenile court did not err in allowing the foster parents to testify about their willingness to adopt the children. Section 43-292.02(2) provides that such evidence shall have no bearing on whether a court should terminate parental rights. But the Court of Appeals' error is not a reversible error because we did not consider this testimony in our de novo review of the best interests issue.

The Court of Appeals did not err in deciding Wendy's due process rights were sufficiently protected when the juvenile court allowed the foster mothers to testify about the children's statements regarding visitation. Any error by the juvenile court in admitting the testimony was harmless error.

The Court of Appeals did not err in determining that the termination of Wendy's parental rights is in the children's best interests. Given that Wendy tested positive for methamphetamine in April 2006 and other evidence on the record, we conclude there exits clear and convincing evidence that terminating Wendy's parental rights is in the best interests of the children. We affirm.

AFFIRMED.

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[21] *In re Interest of DeWayne G. & Devon G., supra* note 19.

STATE OF NEBRASKA, APPELLEE, V.
REGINA A. JACKSON, APPELLANT.
742 N.W.2d 751

Filed December 21, 2007. No. S-07-084.

1. **Double Jeopardy: Pleadings: Final Orders: Appeal and Error.** The overruling of a plea in bar raising a double jeopardy claim is a final order from which an appeal may be taken.

2. **Pleadings.** Issues regarding the grant or denial of a plea in bar are questions of law.
3. **Judgments: Appeal and Error.** On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
4. **Constitutional Law: Double Jeopardy.** The Fifth Amendment to the U.S. Constitution and article I, § 12, of the Nebraska Constitution protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense.
5. ____: ____. The protection provided by Nebraska's double jeopardy clause is coextensive with that provided by the U.S. Constitution.
6. **Double Jeopardy: Juries: Pleas.** Jeopardy attaches (1) in a case tried to a jury, when the jury is impaneled and sworn; (2) when a judge, hearing a case without a jury, begins to hear evidence as to the guilt of the defendant; or (3) at the time the trial court accepts the defendant's guilty plea.
7. **Constitutional Law: Double Jeopardy.** The constitutional protection against double jeopardy does not mean that every time a defendant is put to trial before a competent tribunal, he or she is entitled to go free if the trial fails to end in a final judgment.
8. **Constitutional Law: Double Jeopardy: Final Orders: New Trial.** Where jeopardy has attached in a prior criminal proceeding which does not result in final judgment and the State subsequently seeks to retry the defendant on the same charge, the constitutional protection against double jeopardy bars the retrial only if the prior proceeding terminated jeopardy.
9. **Double Jeopardy: Motions for Mistrial.** A mistrial does not automatically terminate jeopardy, because a trial can be discontinued when particular circumstances manifest a necessity for doing so, and when failure to discontinue would defeat the ends of justice.
10. ____: ____. Double jeopardy does not arise if the State can demonstrate manifest necessity for a mistrial declared over the objection of the defendant.

Appeal from the District Court for Douglas County, GARY B. RANDALL, Judge, on appeal thereto from the County Court for Douglas County, JEFFREY MARCUZZO, Judge. Judgment of District Court reversed, and cause remanded with directions.

Thomas C. Riley, Douglas County Public Defender, and Mark A. Mendenhall for appellant.

Paul D. Kratz, Omaha City Attorney, Martin J. Conboy III, Omaha City Prosecutor, and J. Michael Tesar for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

STEPHAN, J.

The question presented in this appeal is whether a mistrial resulting from the recusal of the trial judge during a bench trial bars retrial under the double jeopardy provisions of the state and federal Constitutions. The issue turns on whether the record reflects a "manifest necessity" for terminating the trial. We conclude that it does not.

BACKGROUND

Regina A. Jackson was charged in the county court for Douglas County with assault and battery, disorderly conduct, and driving under the influence, all misdemeanor offenses defined by the Omaha Municipal Code. She entered pleas of not guilty to each charge, and the case was scheduled for trial.

At the beginning of the bench trial, immediately after both counsel had entered their appearances, the trial judge stated: "Before we go any further on this I want everybody here to know that I've seen [Jackson] working in the clerk's office. I don't know her in anyway [sic]. I mean I just see her and say hi. You want me to recuse myself?" Jackson responded in the negative, and neither counsel requested recusal. The prosecutor indicated that she was willing to proceed.

The first witness was the victim of the alleged assault. After her testimony was concluded, the judge asked to see counsel in chambers, where he stated:

> The more I think about this case the more I feel it would be appropriate to appoint . . . an outside judge. I mean I should recuse myself from hearing any further evidence in this matter. We are going to check with the presiding judge and see when we could get an outside judge to come in and hear this case and we will schedule it. We will let you know this afternoon.

Later the same day, counsel and Jackson appeared before the judge, who noted for the record that he had recused himself "in the middle of the trial" and that he would enter a mistrial on his own motion. The prosecutor responded, "Manifest necessity," and the judge said, "Manifest necessity and continue this matter until this afternoon and declare a mistrial." At that point, Jackson's counsel objected, noting that a witness had testified

and jeopardy had attached and that Jackson was present and prepared to proceed. The judge noted the objection, but stated, "Due to manifest necessity this matter is declared a mistrial." The court entered a written order to this effect on the same day, and the trial was rescheduled.

Jackson subsequently filed a plea in bar, asserting that retrial would violate her constitutional right not to be subjected to double jeopardy. The plea in bar was denied, and Jackson appealed to the district court for Douglas County, which affirmed the judgment of the county court. Jackson perfected this timely appeal, which we moved to our docket pursuant to our statutory authority to regulate the caseloads of the appellate courts of this state.[1]

ASSIGNMENT OF ERROR

Jackson assigns that the district court erred in affirming the denial of her plea in bar.

STANDARD OF REVIEW

[1-3] The overruling of a plea in bar raising a double jeopardy claim is a final order from which an appeal may be taken.[2] Issues regarding the grant or denial of a plea in bar are questions of law.[3] On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.[4]

ANALYSIS

[4-8] The Fifth Amendment to the U.S. Constitution and article I, § 12, of the Nebraska Constitution protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense.[5] The protection

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[1] See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

[2] See, *State v. Woodfork*, 239 Neb. 720, 478 N.W.2d 248 (1991), *overruled on other grounds, State v. Williams*, 243 Neb. 959, 503 N.W.2d 561 (1993); *State v. Smith*, 3 Neb. App. 564, 529 N.W.2d 116 (1995).

[3] *State v. Humbert*, 272 Neb. 428, 722 N.W.2d 71 (2006).

[4] *Id.*

[5] See, *State v. Marshall*, 269 Neb. 56, 690 N.W.2d 593 (2005); *State v. Rhea*, 262 Neb. 886, 636 N.W.2d 364 (2001).

provided by Nebraska's double jeopardy clause is coextensive with that provided by the U.S. Constitution.[6] Jeopardy attaches (1) in a case tried to a jury, when the jury is impaneled and sworn; (2) when a judge, hearing a case without a jury, begins to hear evidence as to the guilt of the defendant; or (3) at the time the trial court accepts the defendant's guilty plea.[7] However, the constitutional protection against double jeopardy does not mean that every time a defendant is put to trial before a competent tribunal, he is entitled to go free if the trial fails to end in a final judgment.[8] Where jeopardy has attached in a prior criminal proceeding which does not result in final judgment and the State subsequently seeks to retry the defendant on the same charge, the constitutional protection against double jeopardy bars the retrial only if the prior proceeding terminated jeopardy.[9]

[9,10] In this case, jeopardy attached when the court heard testimony. The mistrial declared on the court's own motion over Jackson's objection prevented a final judgment. However, a mistrial does not automatically terminate jeopardy, because "a trial can be discontinued when particular circumstances manifest a necessity for doing so, and when failure to discontinue would defeat the ends of justice."[10] Double jeopardy does not arise if the State can demonstrate manifest necessity for a mistrial declared over the objection of the defendant.[11]

The U.S. Supreme Court has held that while "[t]he words 'manifest necessity' appropriately characterize the magnitude of the prosecutor's burden[,] . . . those words do not describe a standard that can be applied mechanically or without attention

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[6] *State v. Marshall, supra* note 5; *State v. Winkler*, 266 Neb. 155, 663 N.W.2d 102 (2003); *State v. Nelson*, 262 Neb. 896, 636 N.W.2d 620 (2001).

[7] *State v. Vasquez*, 271 Neb. 906, 716 N.W.2d 443 (2006).

[8] *Wade v. Hunter*, 336 U.S. 684, 69 S. Ct. 834, 93 L. Ed. 974 (1949); *State v. Marshall, supra* note 5; *State v. Bostwick*, 222 Neb. 631, 385 N.W.2d 906 (1986).

[9] *State v. Marshall, supra* note 5. See *State v. Bostwick, supra* note 8.

[10] *Wade v. Hunter, supra* note 8, 336 U.S. at 690.

[11] *Arizona v. Washington*, 434 U.S. 497, 98 S. Ct. 824, 54 L. Ed. 2d 717 (1978); *State v. Marshall, supra* note 5.

to the particular problem confronting the trial judge."[12] The Court has also recognized that "there are degrees of necessity and we require a 'high degree' before concluding that a mistrial is appropriate."[13] The Court noted that "the strictest scrutiny is appropriate when the basis for the mistrial is the unavailability of critical prosecution evidence, or when there is reason to believe that the prosecutor is using the superior resources of the State to harass or to achieve a tactical advantage over the accused."[14] Conversely, "[a]t the other extreme is the mistrial premised upon the trial judge's belief that the jury is unable to reach a verdict, long considered the classic basis for a proper mistrial."[15] In order to protect the interest of a criminal defendant in not being subjected to double jeopardy, "reviewing courts have an obligation to satisfy themselves that . . . the trial judge exercised 'sound discretion' in declaring a mistrial."[16]

This court has held that manifest necessity for a mistrial was established in cases where the potential bias of a juror is discovered during trial.[17] However, we have not previously addressed the question of whether manifest necessity for a mistrial is established by the recusal of a judge during a bench trial. Some courts have held that a mistrial was manifestly necessary when a judge declared an inability to disregard evidence which had been ruled inadmissible in the bench trial.[18] Manifest necessity for a mistrial has also been found where the judge conducting a bench trial recognizes and admits having a bias which would affect his or her objectivity.[19] As one court noted: "When judges doubt their own ability to adjudicate impartially, they should

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[12] *Arizona v. Washington, supra* note 11, 434 U.S. at 505-06.

[13] *Id.*, 434 U.S. at 506

[14] *Id.*, 434 U.S. at 508.

[15] *Id.*, 434 U.S. at 509.

[16] *Id.*, 434 U.S. at 514.

[17] *State v. Marshall, supra* note 5; *State v. Clifford*, 204 Neb. 41, 281 N.W.2d 223 (1979).

[18] *Com. v. Morris*, 773 A.2d 192 (Pa. Super. 2001); *Bailey v. State*, 219 Ga. App. 258, 465 S.E.2d 284 (1995).

[19] *Com. v. Leister*, 712 A.2d 332 (Pa. Super. 1998); *Com. v. Smith*, 321 Pa. Super. 51, 467 A.2d 888 (1983).

recuse themselves. . . . Such an inability to be objective creates a manifest necessity for the declaration of a mistrial, particularly when a judge must exert the broad discretion that a bench trial demands."[20] Another court held that manifest necessity exists for a mistrial where, during a bench trial, "the judge correctly decides he must recuse himself, and there is no evidence of bad faith conduct by the judge."[21]

In *Arizona v. Washington*,[22] the Court held that a specific finding of "manifest necessity" is not necessary to prevent termination of jeopardy if the record provides sufficient justification for the mistrial ruling. By the same reasoning, a specific finding of "manifest necessity" by the trial judge will not prevent termination of jeopardy unless the facts and circumstances upon which the finding is based are apparent from the record.

The record in this case is insufficient for us to determine whether or not the mistrial was justified by manifest necessity. Although the trial judge did not refer to any specific provision of the Nebraska Code of Judicial Conduct as the basis for his recusal, canon 3 of the code governs judicial disqualification. It provides that a judge "shall not participate in any proceeding in which the judge's impartiality reasonably might be questioned, *including but not limited to* instances where . . . [t]he judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding."[23] In this case, the trial judge did not specifically state that he had formed a personal bias or prejudice, or that he had knowledge of any disputed evidentiary facts concerning the proceeding. The judge stated only that he had "seen [Jackson] working in the clerk's office" and that he had greeted her by saying "hi." The record does not disclose when or how frequently this occurred. It is not clear from the record whether Jackson was a court employee; the county judge who heard the plea in bar noted that he knew her as "an employee

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[20] *Com. v. Leister, supra* note 19, 712 A.2d at 335 (citations omitted).

[21] *State v. Graham*, 91 Wash. App. 663, 665, 960 P.2d 457, 458 (1998).

[22] *Arizona v. Washington, supra* note 11.

[23] Neb. Code of Jud. Cond., Canon 3E(1) (rev. 2000) (emphasis supplied).

of the Douglas county clerk's office." The trial judge did not explain why, after making his initial disclosure and beginning the trial with the consent of both parties, he concluded that "it would be appropriate to appoint . . . an outside judge" to hear the case. Without a more complete factual record, we cannot make a determination of whether the trial judge's impartiality might be questioned on the basis of his personal acquaintance with Jackson prior to the trial.

We have no reason to doubt that the trial judge gave careful consideration to his decision to recuse himself and declare a mistrial. The difficulty lies in the fact that we cannot determine whether he exercised sound discretion in doing so because of the inadequacy of the record as to the underlying reasons for the decision. Because of the constitutional implications, the State bears the burden of demonstrating the manifest necessity of a mistrial declared over the objection of the defendant in a criminal case.[24] The State cannot meet this burden by simply requesting the court to make a general finding of manifest necessity, as it did here, without a factual record to support the finding. Where the reason for a mistrial is not clear from the record, the uncertainty with respect to manifest necessity must be resolved in favor of the defendant.[25]

CONCLUSION

For these reasons, we conclude that the State did not meet its burden of demonstrating the manifest necessity of the mistrial and that therefore, the declaration of the mistrial terminated jeopardy. Retrial would violate Jackson's constitutional right not to be placed twice in jeopardy, and, accordingly, her plea in bar should have been sustained. We therefore reverse the judgment of the district court and remand the cause to that court with directions to reverse the order of the county court's overruling Jackson's plea in bar and remand the matter to the county court with directions to dismiss.

REVERSED AND REMANDED WITH DIRECTIONS.

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[24] *Arizona v. Washington, supra* note 11.

[25] See, *West Valley City v. Patten*, 981 P.2d 420 (Utah App. 1999); *Allen v. State*, 656 S.W.2d 592 (Tex. App. 1983).

ROBERT LOWE, APPELLEE, V. DRIVERS MANAGEMENT, INC., APPELLANT.

743 N.W.2d 82

Filed December 21, 2007. No. S-07-428.

1. **Workers' Compensation: Appeal and Error.** Pursuant to Neb. Rev. Stat. § 48-185 (Reissue 2004), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.
2. ____: ____. In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the findings of the trial judge who conducted the original hearing.
3. ____: ____. On appellate review, the findings of fact made by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong.
4. ____: ____. An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law.
5. **Workers' Compensation.** Neb. Rev. Stat. § 48-162.01(7) (Cum. Supp. 2006) establishes a two-part test to determine whether benefits should be suspended, reduced, or limited. First, the employee must either refuse to undertake or fail to cooperate with a court-ordered physical, medical, or vocational rehabilitation program. Second, the employee's refusal must be without reasonable cause.
6. **Workers' Compensation: Evidence.** Both parts of the two-part test in Neb. Rev. Stat. § 48-162.01(7) (Cum. Supp. 2006) present factual questions to be determined by the trial judge based upon the evidence.
7. **Workers' Compensation: Proof.** To obtain a modification of a prior award, the applicant must prove there exists a material and substantial change for the better or worse in the condition—a change in circumstances that justifies a modification, distinct and different from the condition for which the adjudication had previously been made.
8. **Workers' Compensation: Evidence: Appeal and Error.** When the record in a workers' compensation case presents conflicting medical testimony, an appellate court will not substitute its judgment for that of the compensation court.
9. **Workers' Compensation: Expert Witnesses.** The Workers' Compensation Court trial judge is entitled to accept the opinion of one expert over another.
10. **Workers' Compensation: Proof.** Under the provisions of Neb. Rev. Stat. § 48-162.01(7) (Cum. Supp. 2006), the employer bears the burden of proof to demonstrate that an injured employee has refused to undertake or failed to cooperate with a physical, medical, or vocational rehabilitation program and that such refusal or failure is without reasonable cause such that the compensation court or judge may properly rely on such evidence to suspend, reduce, or limit the compensation otherwise payable under the Nebraska Workers' Compensation Act.

Appeal from the Workers' Compensation Court. Affirmed in part, and in part reversed and remanded with directions.

Daniel R. Fridrich, of Werner Enterprises, Inc., for appellant.

Timothy S. Dowd, of Dowd, Howard & Corrigan, L.L.C., for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MILLER-LERMAN, J.

NATURE OF CASE

In 2004, appellee Robert Lowe received a workers' compensation award that included permanent partial disability and vocational rehabilitation benefits as a result of an injury he sustained while employed by appellant Drivers Management, Inc. (DMI). The present appeal involves an application filed by Lowe in 2005 to modify that initial award. Following a hearing, the trial judge of the Nebraska Workers' Compensation Court sustained Lowe's application. The trial judge determined that Lowe was permanently and totally disabled and awarded Lowe permanent total disability benefits. However, pursuant to Neb. Rev. Stat. § 48-162.01(7) (Cum. Supp. 2006), the judge ordered that Lowe's disability benefits be reduced for a period of time prior to the modification proceedings due to Lowe's failure to participate in vocational rehabilitation services.

Both DMI and Lowe appealed to the Nebraska Workers' Compensation Court three-judge review panel. The review panel affirmed that part of the trial judge's order that determined Lowe was entitled to permanent total disability benefits but reversed that portion of the order that had reduced Lowe's benefits for failing to participate in vocational rehabilitation services. DMI appeals. Because there was competent evidence to support the reduction, we reverse that portion of the review panel's order that reversed the trial judge's order reducing Lowe's workers' compensation benefits pursuant to § 48-162.01(7). In all other respects, the review panel's order is affirmed.

STATEMENT OF FACTS

In 2001, Lowe sustained an injury arising out of and in the course of his employment with DMI. The injury resulted in neck and radicular arm pain. Lowe filed a petition with the Nebraska Workers' Compensation Court. In an order filed February 11, 2004, he was awarded workers' compensation disability benefits (the initial award). The initial award provided that Lowe receive permanent partial disability benefits based upon a 70-percent loss of earning capacity. The court also approved a vocational rehabilitation plan calling for job placement services. Specifically, the court determined that a vocational rehabilitation plan had "been approved by a vocational rehabilitation specialist, and so [Lowe] should participate in this plan."

It is undisputed that Lowe failed to participate in the plan. The record reflects that the vocational rehabilitation counselor who was to assist Lowe with job placement services "left several [telephone] messages for [Lowe] and sent him a letter dated 3/12/04 asking him to contact [her] but [she] never heard back from him." After the counselor failed to receive a response from Lowe, she "submitted a case closure report form to the Nebraska Workers' Compensation Court dated 4/20/04 with the status of 'Closed Not Working—Not Interested in VR Services.'"

In July 2004, as a result of "gradually increasing pain in his neck, left shoulder, and left arm," Lowe began treating with Dr. Gerard H. Dericks. On October 4, 2005, Lowe filed an application to modify the initial award, claiming that he was totally disabled. On April 14, 2006, a modification hearing was held before a trial judge of the workers' compensation court on Lowe's application. A total of 66 exhibits were received into evidence, including Dericks' medical reports and deposition. Lowe appeared and testified during the hearing.

On August 22, 2006, the trial judge entered his "Further Award." The judge found that Lowe had failed to participate in court-ordered vocational rehabilitation services and that he did not have reasonable cause for failing to participate in those services during a period immediately after those services had been awarded. As a result, pursuant to § 48-162.01(7), the judge ordered a partial reduction in the amount of the disability

benefits awarded to Lowe prior to the modification proceedings. In his further award, the trial judge also determined that there had been a material and substantial change in Lowe's condition, necessitating a reassessment of Lowe's loss of earning capacity. The judge determined that Lowe was permanently and totally disabled and awarded Lowe disability benefits based upon his permanent and total disability. With respect to Lowe's failure to participate in vocational rehabilitation, the judge did not reduce compensation for Lowe's permanent and total disability going forward, stating "there is reasonable cause not to participate [in vocational rehabilitation] because [Lowe] is totally disabled." For the sake of completeness, we are aware of certain internal inconsistencies in the reasoning of the trial judge's opinion, but the existence of these matters is not relevant to the resolution of the legal issues presented in this appeal.

DMI filed for review of the trial judge's further award before the workers' compensation review panel. Lowe also filed for review of that portion of the trial judge's further award that reduced his benefits for failure to participate in the vocational rehabilitation plan. A hearing was held before the review panel on February 6, 2007, and on March 16, the review panel entered its "Order of Affirmance in Part on Review and Reversal in Part on Review." The review panel determined that the trial judge was not clearly wrong when he found that Lowe was permanently and totally disabled, and therefore, it affirmed that portion of the trial judge's further award. However, the review panel determined that the trial judge erred in reducing Lowe's workers' compensation benefits pursuant to § 48-162.01(7), and it reversed that part of the trial judge's further award. DMI appeals.

ASSIGNMENTS OF ERROR

On appeal, DMI assigns numerous errors that can be restated as two. DMI claims that the Workers' Compensation Court review panel erred (1) in reversing that portion of the trial judge's further award that reduced the amount of disability benefits owed to Lowe due to his failure to participate in vocational rehabilitation services immediately after those services had been awarded and (2) in affirming the trial judge's further

award that modified Lowe's initial award and that determined Lowe was permanently totally disabled.

STANDARDS OF REVIEW

[1] Pursuant to Neb. Rev. Stat. § 48-185 (Reissue 2004), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award. *Olivotto v. DeMarco Bros. Co.*, 273 Neb. 672, 732 N.W.2d 354 (2007).

[2-4] In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the findings of the trial judge who conducted the original hearing. *Id.* On appellate review, the findings of fact made by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong. *Id.* An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law. *Sheldon-Zimbelman v. Bryan Memorial Hosp.*, 258 Neb. 568, 604 N.W.2d 396 (2000).

ANALYSIS

As its first assignment of error, DMI claims that the review panel erred when it reversed that portion of the trial judge's further award that had reduced the amount of disability benefits owed to Lowe due to his failure to participate in vocational rehabilitation. The statute at issue with respect to this claim is § 48-162.01(7), which currently provides, in pertinent part, as follows:

> If the injured employee without reasonable cause refuses to undertake or fails to cooperate with a physical, medical, or vocational rehabilitation program determined by the compensation court or judge thereof to be suitable for him or her . . . the compensation court or judge thereof may suspend, reduce, or limit the compensation otherwise payable under the Nebraska Workers' Compensation Act.

DMI asserts that this statute establishes a two-part test to determine whether benefits should be suspended, reduced, or limited. First, the employee must either refuse to undertake or fail to cooperate with a court-ordered physical, medical, or vocational rehabilitation program. Second, the employee's refusal must be without reasonable cause.

[5,6] We agree with DMI's assertion that § 48-162.01(7) establishes a two-part test. We further note that it has been held that both parts of this two-part test present factual questions to be determined by the trial judge based upon the evidence. See *Warburton v. M & D Construction Co.*, 1 Neb. App. 498, 498 N.W.2d 611 (1993).

In his decision, the trial judge found that Lowe did not participate in the job placement services he was ordered to participate in under the initial award, a fact that neither party disputes. Further, as we read his order, the trial judge found that during the period from the initial award up to the modification proceedings, Lowe's failure to participate in vocational rehabilitation was without reasonable cause. The record contains evidence supporting this finding of fact. Specifically, the record contains evidence to the effect that immediately following the entry of the February 11, 2004, initial award, Lowe failed to respond to the vocational rehabilitation counselor's efforts to contact him with regard to these services, thereby causing her to submit a case closure report form dated April 20, 2004, to the Nebraska Workers' Compensation Court with the status of "Closed Not Working—Not Interested in VR Services." Thus, the record indicates that Lowe took no steps to participate in vocational rehabilitation despite an award and efforts to provide services.

In determining whether to affirm, modify, reverse, or set aside a judgment of the workers' compensation court review panel, a higher appellate court reviews the findings of the trial judge who conducted the hearing. *Olivotto v. DeMarco Bros. Co.*, 273 Neb. 672, 732 N.W.2d 354 (2007). Upon appellate review, the findings of fact made by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong. *Id.* The record contains evidence supporting the trial judge's findings of fact to the effect that

Lowe refused to cooperate in vocational rehabilitation without reasonable cause during the time period immediately after the initial award. As a result, the trial judge was not clearly wrong when he ordered a reduction in Lowe's disability benefits for the period of time prior to the modification proceedings and the review panel erred in reversing this portion of the trial judge's further award.

For its second assignment of error, DMI claims that the review panel erred in affirming the trial judge's further award that modified Lowe's initial award and that awarded Lowe permanent total disability benefits. In this regard, DMI argues that the medical evidence does not support an award of permanent total disability benefits and that even if such status is now warranted, because of Lowe's failure to avail himself of vocational rehabilitation services, his situation worsened and Lowe's benefits should be reduced.

[7] The modification of an earlier workers' compensation award is governed by Neb. Rev. Stat. § 48-141 (Reissue 2004), which provides, inter alia, that "at any time after six months from the date of the . . . award, an application [for modification] may be made by either party on the ground of increase or decrease of incapacity due solely to the injury." We have previously stated that to obtain a modification of a prior award, "[t]he applicant must prove there exists a material and substantial change for the better or worse in the condition—a change in circumstances that justifies a modification, distinct and different from the condition for which the adjudication had previously been made." *Hagelstein v. Swift-Eckrich*, 261 Neb. 305, 308, 622 N.W.2d 663, 667 (2001).

In support of its assignment of error objecting to the award of permanent total disability benefits, DMI argues that the trial judge erred in relying upon the medical reports and opinions of Dericks because Dericks had not treated Lowe prior to July 2004. Instead, DMI argues that the trial judge should have accepted the opinions of DMI's expert who examined Lowe prior to the initial award and also prior to the modification hearing.

[8,9] We have previously stated that when the record in a workers' compensation case presents conflicting medical testimony, an appellate court will not substitute its judgment for

that of the compensation court. *Worline v. ABB/Alstom Power Int. CE Servs.*, 272 Neb. 797, 725 N.W.2d 148 (2006). The trial judge is entitled to accept the opinion of one expert over another. *Id.*

The record from the modification hearing contains evidence that beginning sometime in July 2004, Lowe began treating with Dericks for "gradually increasing pain in his neck, left shoulder, and left arm." Dericks' medical report dated October 19, 2005, indicates that an MRI of Lowe's cervical spine was performed in September 2004, and when he compared it to an MRI conducted in 2001, prior to the initial award, Dericks determined that "it was quite obvious that there was substantially increased posterior herniation of disk material behind the body of C6. That is to say, it appears that the disk has progressed causing further deformation of the spinal canal behind the vertebral body of the C6." Moreover, the record contains a medical questionnaire dated December 23, 2005, in which Dericks answered "Yes" when effectively asked whether Lowe's physical condition noted by Dericks in his October 19 report was "due solely to the injury he sustained as the result of his work accident while employed with" DMI.

In this case, it is apparent that the trial judge found Dericks' opinion to be credible and persuasive. Because we do not substitute our judgment regarding the credibility of expert witnesses for that of the compensation court, see *Worline v. ABB/Alstom Power Int. CE Servs., supra*, the issue before us is whether Dericks' opinion supports the trial judge's determination that there had been a material and substantial change for the worse in Lowe's condition. It was within the trial judge's authority to credit Dericks' opinion, and the opinion supports the award. Given our standard of review and the evidence in the record, we cannot say that the review panel erred in affirming the trial judge's further award modifying Lowe's initial award due to a material and substantial change for the worse in Lowe's condition and finding Lowe to be permanently and totally disabled.

Notwithstanding evidence that Lowe was permanently and totally disabled, DMI argues in its brief that under the job placement plan approved by the Workers' Compensation Court

in the initial award, there were jobs available to Lowe, and thus "had [Lowe] participated in the plan [he] would have found a job. Had [Lowe] been working at the time of [the modification hearing], it would have been difficult for [Lowe] to argue he was totally disabled." Brief for appellant at 34. At the modification hearing, DMI offered no evidence to support its assertion on appeal that participation in vocational rehabilitation services would have forestalled or prevented Lowe from becoming permanently and totally disabled and that Lowe's failure to participate in vocational rehabilitation was unreasonable as it bore on the issue of permanent and total disability. Rather than referring to evidence in support of its assertion, DMI relies on argument and the provisions of § 48-162.01(7). DMI claims that going forward, the review panel should have reduced Lowe's permanent total disability benefits otherwise payable due to his failure to participate in the court-ordered vocational rehabilitation services during the period between the initial award and the modification proceedings.

We have not previously determined which party bears the burden of proof to establish the two-part test set forth under § 48-162.01(7). However, we have discussed such burden under another provision in the Nebraska Workers' Compensation Act, Neb. Rev. Stat. § 48-120(2)(c) (Supp. 2007), which provision contains language similar to § 48-162.01(7). Section 48-120(2)(c) currently provides that if an injured employee "unreasonably refuses or neglects to avail himself or herself of medical or surgical treatment furnished by the employer . . . the compensation court or judge thereof may suspend, reduce, or limit the compensation otherwise payable under the Nebraska Workers' Compensation Act." When considering this language, we have stated that "[t]he unreasonableness of the refusal of an injured employee to permit an operation to be performed is a question of fact to be determined by the evidence, and the burden of proof . . . is upon the employer." *Simmerman v. Felthauser*, 125 Neb. 795, 798, 251 N.W. 831, 833 (1934).

[10] The language used in § 48-120(2)(c) is comparable to the language used in § 48-162.01(7) now under consideration. Thus, it logically follows that under the provisions of § 48-162.01(7), the employer bears the burden of proof to

demonstrate that an injured employee has refused to undertake or failed to cooperate with a physical, medical, or vocational rehabilitation program and that such refusal or failure is without reasonable cause such that the compensation court or judge may properly rely on such evidence to suspend, reduce, or limit the compensation otherwise payable under the Nebraska Workers' Compensation Act.

We have reviewed the record to determine whether DMI has carried its burden of proof. DMI has not directed us to evidence, and we have not located evidence in the record that supports DMI's arguments urging a reduction of benefits for the period after the modification proceedings. The record from the modification hearing contains a "Revised Loss of Earning Power Analysis," dated January 9, 2006, and prepared by a vocational rehabilitation counselor mutually agreed to by Lowe and DMI. In that report, the counselor stated that based upon Dericks' medical reports, "Lowe is not capable of obtaining a job on a full-time or a part-time basis" and that as a result, Lowe had "sustained a loss of earning power of 100% as the result of his February, 2001 work injury." It appears the trial judge relied upon this evidence when, in his consideration of Lowe's claim of permanent and total disability, he stated "there is reasonable cause not to participate [in vocational rehabilitation] because [Lowe] is totally disabled." The record supports this determination.

Earlier in this opinion, we have agreed with DMI and the trial judge that the evidence showed that Lowe lacked reasonable cause for his failure to participate in vocational rehabilitation immediately after the initial award, and we have approved of a reduction of benefits therefore. However, with respect to the period commencing with these modification proceedings, without evidence, this court "will not speculate as to what might" have ensued relative to Lowe's permanent and total disability claim had Lowe participated in the court-approved vocational rehabilitation plan. See *Simmerman v. Felthauser*, 125 Neb. at 800, 251 N.W. at 833. As to the later timeframe, DMI failed to demonstrate that Lowe refused to participate in vocational rehabilitation without reasonable cause and that had he participated in the court-ordered job placement services, he would

have been employed at the time of the modification hearing. The employer did not offer evidence upon which a trial judge should "suspend, reduce, or limit the compensation otherwise payable." § 48-162.01(7). The trial judge did not err, and the review panel did not err in affirming the trial judge's award of permanent total disability benefits. We find no merit to DMI's second assignment of error challenging the award of permanent total disability benefits.

We have considered DMI's remaining arguments made in connection with his assignments of error, and we conclude they are without merit.

CONCLUSION

For the reasons discussed, we conclude that the Workers' Compensation Court review panel erred when it reversed the trial judge's finding that Lowe, without reasonable cause, refused to participate in court-ordered vocational rehabilitation services immediately after those services had been awarded. In all other respects, the review panel's order is affirmed. Accordingly, we reverse that portion of the review panel's order that reversed the trial judge's further award that reduced Lowe's workers' compensation benefits for a period of time pursuant to § 48-162.01(7) and remand the cause to the review panel with directions to affirm the further award entered by the trial judge in its entirety.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

Maurice Fokken, appellee, v. John P. Steichen, appellee, and Coregis Insurance Company, Inc., garnishee-appellant.

Deanna Wright Miller, appellee, v. John P. Steichen, appellee, and Coregis Insurance Company, Inc., garnishee-appellant.

744 N.W.2d 34

Filed January 4, 2008. Nos. S-06-614, S-06-615.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Insurance: Contracts.** The interpretation of an insurance policy is a question of law.
4. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
5. **Judgments: Debtors and Creditors: Garnishment.** The claim of a judgment creditor garnishor against a garnishee can rise no higher than the claim of the garnishor's judgment debtor against the garnishee.
6. **Insurance: Contracts.** An insurance policy is a contract between an insurance company and an insured, and as such, the insurance company has the right to limit its liability by including limitations in the policy definitions. If the definitions in the policy are clearly stated and unambiguous, the insurance company is entitled to have such terms enforced.
7. ____: ____. Insurance contracts, like other contracts, are to be construed according to the sense and meaning of the terms which the parties have used. If the terms of the contract are clear and unambiguous, they are to be taken and understood in their plain, ordinary, and popular sense.
8. ____: ____. An ambiguity exists in an insurance contract only when the policy can be interpreted to have two or more reasonable meanings.
9. ____: ____. The language of an insurance policy should be read to avoid ambiguities, if possible, and the language should not be tortured to create them.
10. **Insurance: Contracts: Proof.** The burden to prove that an exclusionary clause in a policy applies rests on the insurer.
11. **Appeal and Error.** An appellate court is not obligated to engage in an analysis that is not needed to adjudicate the controversy before it.

Appeals from the District Court for Douglas County: MARLON A. POLK, Judge. Reversed and remanded with directions.

Gerald L. Friedrichsen and Joshua W. Weir, of Fitzgerald, Schorr, Barmettler & Brennan, P.C., L.L.O., and Jeffrey A. Goldwater, Michelle M. Bracke, and Robert A. Chaney, of Bollinger, Ruberry & Garvey, for garnishee-appellant.

James E. Harris, Britany S. Shotkoski, and Michaela Skogerboe, of Harris Kuhn Law Firm, L.L.P., for appellees.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MCCORMACK, J.

NATURE OF CASE

Judgment was entered against John P. Steichen and in favor of Maurice Fokken and Deanna Wright Miller (collectively the appellees) in separate legal malpractice actions brought against Steichen. The appellees then instituted separate garnishment proceedings against Coregis Insurance Company, Inc. (Coregis). Coregis had issued Steichen's law firm a lawyers professional liability insurance policy (the Policy) which the appellees allege provides coverage for their claims against Steichen. After consolidating the appellees' cases, the district court for Douglas County entered summary judgment in favor of the appellees and against Coregis. In an amended final order, the court awarded postjudgment interest in favor of the appellees from the date judgment was entered against Steichen in the appellees' separate legal malpractice claims. In this appeal, Coregis contends that it is not obligated to indemnify Steichen. Coregis further contends that postjudgment interest should not have been entered as of the date judgments were entered against Steichen and that additional attorney fees should not have been awarded to the appellees.

BACKGROUND

(1) DEANNA WRIGHT MILLER

In June 1989, Miller was involved in a motor vehicle accident. Miller was ultimately represented by Steichen in litigation

related to that accident. In January 1999, Miller filed a professional liability action against Steichen. Miller alleged that without consulting her and without her authority, Steichen accepted a settlement offer in the amount of $30,000 which was not adequate to compensate her for her injuries and would have been rejected by her. Miller alleged that Steichen stipulated to the dismissal with prejudice of her lawsuit and that because the statute of limitations had run on her claim, she was barred from any further action. Miller further alleged that without her authority, Steichen signed Miller's name on a release agreement and on the back of a settlement check, endorsing that check. Miller alleged that she had not received any proceeds from the settlement.

The district court entered a judgment in favor of Miller in the amount of $325,000, which the court concluded was the fair and reasonable settlement value or jury verdict of Miller's claim had it been prosecuted in the absence of professional negligence. The court explained that Miller alleged that the following acts by Steichen constituted legal malpractice: (1) his failure to communicate to Miller all settlement offers, (2) his acceptance of a settlement offer on Miller's behalf without Miller's approval or consent, (3) his placement of Miller's signature on a release and his endorsement of the settlement check without Miller's consent, (4) his allowance of the dismissal of Miller's lawsuit with prejudice after the statute of limitations had expired, and (5) his breach of professional and fiduciary duties to act in the best interests of his client. After judgment was entered in Miller's favor, Miller instituted garnishment proceedings against Coregis, which issued a professional liability policy that is alleged to provide coverage for Miller's legal malpractice claim against Steichen. Miller served a summons and order of garnishment and interrogatories in aid of execution on Coregis. The summons was sent to "Sally Ann Hawk," who was listed in Coregis' 2000 annual statements as the chairperson, president, and chief executive officer. Coregis did not respond, and following a hearing on the matter, the district court entered a default judgment against Coregis.

Thereafter, Coregis filed a special appearance, arguing that it did not receive proper and sufficient service of summons, the

affidavit and praecipe for summons were improperly issued, and there was no merit to Miller's contention that Coregis was indebted to Steichen under the Policy. The district court overruled Coregis' special appearance. Coregis then filed a motion to vacate the default judgment, which was also overruled by the district court. In *Miller v. Steichen*,[1] this court reversed the judgment of the district court and remanded the cause with directions to the district court to vacate the default judgment and give Coregis reasonable time in which to file an appropriate responsive pleading.

(2) Maurice Fokken

Fokken was involved in a motor vehicle accident in December 1991. Fokken ultimately retained Steichen to represent him in the litigation pertaining to that accident. In December 1997, Fokken filed a professional liability action against Steichen. Fokken alleged that without Fokken's authority, Steichen accepted a settlement offer in the amount of $8,627.57 and stipulated to the dismissal with prejudice of Fokken's lawsuit after the statute of limitations had run on Fokken's claim. Fokken further alleged that without Fokken's knowledge or consent, Steichen signed Fokken's name and the name of his ex-wife on a release agreement and on the back of a settlement check, endorsing that check, and that Fokken had not received the proceeds of the settlement check.

The district court granted summary judgment in favor of Fokken on the issue of liability and on the issue of damages against Steichen. The court entered judgment against Steichen in the amount of $50,000. That amount included $40,000, which the court concluded to be the fair and reasonable settlement value or jury verdict of Fokken's claim had it been prosecuted in the absence of professional malpractice, and $10,000 in attorney fees. The court explained that Fokken alleged that the following acts by Steichen constituted legal malpractice: (1) his failure to communicate with Fokken all settlement offers, (2) his acceptance of a settlement offer on Fokken's behalf without approval or consent by Fokken, (3) his allowance of

[1] *Miller v. Steichen*, 268 Neb. 328, 682 N.W.2d 702 (2004).

Fokken's lawsuit to be dismissed with prejudice after the statute of limitations had expired, and (4) his breach of his professional fiduciary duty to act in Fokken's best interest. The court entered judgment in favor of Fokken in the amount of $50,000. After judgment was entered in Fokken's favor, Fokken instituted garnishment proceedings against Coregis. Like Miller, Fokken alleged that the Policy issued by Coregis provided coverage for Fokken's claims against Steichen.

(3) Consolidation of Fokken's and Miller's Cases

The district court consolidated the appellees' cases against Coregis. Thereafter, Coregis filed an amended answer to garnishment interrogatories alleging the Policy did not provide coverage for the claims made by the appellees. The appellees then filed an amended application to determine Coregis' liability.

All parties moved the district court for summary judgment. In its motion, Coregis asserted that it had no obligation to indemnify Steichen because Steichen executed a policyholder release in favor of Coregis. Coregis asserted before the district court that in exchange for Coregis' agreement to relinquish its rights to defend, investigate, and negotiate with regard to Fokken's claim under the Policy, Steichen executed a policyholder release wherein Steichen and his law firm released Coregis from any and all liability based upon, arising out of, or relating in any manner to Fokken's lawsuit against Steichen. Coregis further asserted that it had no obligation to indemnify Steichen because exclusions A and L of the Policy precluded coverage for the judgments obtained by the appellees. Exclusion A of the Policy provides that the Policy does not apply to "any CLAIM that results in a final adjudication against any INSURED that an INSURED has committed any criminal, dishonest, fraudulent or malicious acts, errors, omissions or PERSONAL INJURIES." Exclusion L of the Policy provides that the Policy does not apply to "any CLAIM arising out of conversion, misappropriation or improper commingling of funds."

The district court denied Coregis' motion for summary judgment, but granted the appellees' motion for summary judgment. The court found that exclusion A does not preclude coverage

because the summary judgments entered against Steichen did not adjudge him to have committed criminal, dishonest, or fraudulent conduct. The court also found that Steichen's disbarment by this court was not dispositive. The district court explained that exclusion A applies to claims and that the definitions section of the Policy "provides a separate definition for 'disciplinary proceeding', which does not include any mention of the word 'claim.'" The court also found that exclusion L does not preclude coverage. The court explained that Coregis incorrectly argued the genesis of the appellees' malpractice claims against Steichen because he wrongly kept, or converted, the proceeds from settlements he failed to disclose to the appellees. The court instead found that the appellees' malpractice claims stemmed from Steichen's failing to communicate settlement offers and Steichen's agreeing to the dismissal of the appellees' claims after the statute of limitations had run without the appellees' knowledge. The court further found that the policyholder release is void as against public policy and unenforceable. The court stated that Coregis and Steichen contracted for legal malpractice insurance and that upon receipt of notice of Fokken's legal malpractice claim against Steichen, Coregis had a duty, not a right, to defend Steichen. The district court further stated that permitting Steichen to release Coregis after a claim had been filed and received by both parties is against public policy and unlawfully deprives Fokken of the ability to pursue financial redress against Steichen. The district court entered judgment in favor of Fokken and against Coregis in the amount of $50,058. The court entered judgment in favor of Miller and against Coregis in the amount of $325,058.

The appellees filed a motion requesting the district court to enter a final order taxing costs, including a reasonable attorney fee, and computing the amount of interest owing on the underlying original judgments entered against Steichen, in order to determine the specific dollar amount of judgment against Coregis. On April 12, 2006, the district court entered an order in which it determined in part that the appellees are entitled to postjudgment interest from the date of the district court's January 25 judgment. The appellees filed a motion requesting the court to reconsider its calculation of the court's postjudgment

interest. In an amended final order, the district court determined that the appellees are entitled to postjudgment interest from the dates of their original judgments against Steichen. For Fokken, that date is October 24, 2001, and for Miller, that date is June 28, 2001. The court awarded Fokken interest in the amount of $12,269.24 and Miller interest in the amount of $85,427.12. In addition, the court corrected the judgment amount entered in Miller's favor to $360,058. Coregis now appeals.

ASSIGNMENTS OF ERROR

Coregis asserts the following assignments of error on appeal: The district court erred in (1) denying Coregis' motion for summary judgment and in granting the appellees' motion for summary judgment; (2) failing to find that exclusion L of the Policy precludes coverage for the judgments entered in favor of the appellees and against Steichen; (3) failing to find that exclusion A of the Policy precludes coverage for the judgments entered in favor of the appellees and against Steichen; (4) failing to enter an adjudication in connection with exclusion A that Steichen committed dishonest and fraudulent acts in the course of his representation of the appellees; (5) failing to find that the release signed by Steichen precludes coverage under the Policy for the judgment entered in favor of Fokken and against Steichen; (6) finding that the release signed by Steichen is unenforceable on the basis that it violates Nebraska public policy; (7) finding that the appellees are entitled to postjudgment interest from the date of the entry of the judgments in favor of the appellees and against Steichen, instead of from the date that judgment was entered against Coregis; and (8) awarding additional attorney fees to the appellees.

STANDARD OF REVIEW

[1,2] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[2] In reviewing a

[2] *Peterson v. Ohio Casualty Group*, 272 Neb. 700, 724 N.W.2d 765 (2006).

summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.[3]

[3,4] The interpretation of an insurance policy is a question of law.[4] When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.[5]

ANALYSIS

Motions for Summary Judgment

Coregis contends that the district court erred in denying its motion for summary judgment and in granting the appellees' motion for summary judgment. Coregis asserts that summary judgment should have been entered in its favor because exclusions A and L of the Policy preclude coverage for the appellees' claims.

[5] The question of whether Coregis has funds belonging to Steichen which the appellees now seek to garnish depends on whether coverage under the Policy was precluded by any policy exclusions. The claim of a judgment creditor garnishor against a garnishee can rise no higher than the claim of the garnishor's judgment debtor against the garnishee.[6] If Coregis does not owe a duty to indemnify Steichen under the Policy, there are no funds in the hands of Coregis to be garnished by the appellees.

Before we address Coregis' claim that coverage is precluded under the Policy based upon exclusions A and L, we must first determine whether Coregis may challenge coverage based on those exclusions. The appellees contend that under *Metcalf v. Hartford Acc. & Ind. Co.*,[7] Coregis may not now allege that

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[3] *Id.*

[4] *Jones v. Shelter Mut. Ins. Cos., ante* p. 186, 738 N.W.2d 840 (2007).

[5] See *id.*

[6] *Spaghetti Ltd. Partnership v. Wolfe*, 264 Neb. 365, 647 N.W.2d 615 (2002).

[7] *Metcalf v. Hartford Acc. & Ind. Co.*, 176 Neb. 468, 126 N.W.2d 471 (1964).

coverage is precluded under the Policy exclusions. In *Metcalf*, we stated that where an insurance company is notified of a pending suit against an insured and has a full opportunity to defend the action, the judgment against the insured, if obtained without fraud or collusion, will be conclusive against the insurance company.

Coregis is not attacking the judgments obtained by the appellees against Steichen. Rather, it is asserting that it is not liable to pay those judgments because its coverage is excluded under the terms of the Policy. Because Coregis' liability under the terms of the Policy was not litigated in the appellees' separate actions against Steichen, we determine that the appellees' argument is without merit.

[6] An insurance policy is a contract between an insurance company and an insured, and as such, the insurance company has the right to limit its liability by including limitations in the policy definitions.[8] If the definitions in the policy are clearly stated and unambiguous, the insurance company is entitled to have such terms enforced.[9]

[7-10] Insurance contracts, like other contracts, are to be construed according to the sense and meaning of the terms which the parties have used. If the terms of the contract are clear and unambiguous, they are to be taken and understood in their plain, ordinary, and popular sense.[10] An ambiguity exists only when the policy can be interpreted to have two or more reasonable meanings.[11] The language of an insurance policy should be read to avoid ambiguities, if possible, and the language should not be tortured to create them.[12] We explained in *O'Toole v. Brown*:

> "'"[T]he parties to an insurance contract may make the contract in any legal form they desire, and . . . insurance

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[8] *Jones v. Shelter Mut. Ins. Cos., supra* note 4.

[9] *Id.*

[10] *Safeco Ins. Co. of America v. Husker Aviation, Inc.*, 211 Neb. 21, 317 N.W.2d 745 (1982).

[11] *O'Toole v. Brown*, 228 Neb. 321, 422 N.W.2d 350 (1988).

[12] *Hillabrand v. American Fam. Mut. Ins. Co.*, 271 Neb. 585, 713 N.W.2d 494 (2006).

> companies have the same right as individuals to limit their liability and to impose whatever conditions they please upon their obligations, not inconsistent with public policy. If plainly expressed, insurers are entitled to have such exceptions and limitations construed and enforced as expressed."'"[13]

The burden to prove that an exclusionary clause in a policy applies rests on the insurer.[14]

Exclusion L unambiguously provides that coverage under the Policy is excluded for "any CLAIM arising out of conversion, misappropriation or improper commingling of funds." A claim is defined as "a demand made upon any INSURED for DAMAGES, including, but not limited to, service of suit or institution of arbitration proceedings against any INSURED." The question presented here is whether the appellees' claims arise out of conversion, misappropriation, or the improper commingling of funds.

The appellees argue that their claims against Steichen are based on Steichen's failure to communicate settlement offers and his dismissal of their lawsuits outside the statute of limitations, thereby preventing them from obtaining fair compensation for their injuries. The appellees argue that although Steichen may have committed acts of conversion, misappropriation, and/or the commingling of funds, these acts were not the proximate cause of the appellees' damages.

In *O'Toole*,[15] this court was asked to determine whether the phrase "'arising out of the actions of any horses'" required more than a causal connection between the actions of the horses and the accident or injury. Noting that the court was rendering an opinion on the theoretical meaning of a phrase in an insurance policy under the facts presented, this court concluded that "arising out of" does not require more than a causal connection between the accident and injury.[16] Thus, in this case, the phrase

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[13] *O'Toole v. Brown, supra* note 11, 228 Neb. at 326, 422 N.W.2d at 353.

[14] *Peterson v. Ohio Casualty Group, supra* note 2.

[15] *O'Toole v. Brown, supra* note 11, 228 Neb. at 323, 422 N.W.2d at 352.

[16] See *id.*

"any CLAIM arising out of conversion, misappropriation or improper commingling of funds" does not require more than the existence of a causal connection between the claim and any alleged conversion, misappropriation, or improper commingling of funds by Steichen.

The appellees each made a claim against Steichen for legal malpractice. In the district court's order granting summary judgment in favor of Miller, the court found that Miller had alleged Steichen endorsed Miller's settlement check, which amounted to $30,000, without Miller's authority. In the district court's order granting summary judgment in favor of Fokken, the court found that Fokken had alleged Steichen endorsed Fokken's settlement check, which amounted to $8,627.57, without Fokken's knowledge or consent. In the separate answers filed by Steichen in each of these cases, Steichen admits that he did not pay to either Miller or Fokken her or his share of the settlement proceeds.

Steichen's endorsement of Miller's and Fokken's names on the settlement checks and his retention of the settlement proceeds constituted conversion, misappropriation, and improper commingling of funds. These are exactly the activities excluded under exclusion L of the Policy.

Although Steichen's withholding of the settlement proceeds may not be the sole basis for the appellees' claims, those actions were causally connected. Because coverage under the Policy is precluded under exclusion L, we determine that coverage for the amounts converted, misappropriated, and improperly commingled are not covered under the Policy. In Miller's case, that amount is $30,000, and in Fokken's case, that amount is $8,627.57. We must further determine, however, whether the balance of the judgments against Steichen are precluded under the provisions of the Policy.

Exclusion A of the Policy unambiguously provides that coverage under the Policy is excluded for "any CLAIM that results in a final adjudication against any INSURED that an INSURED has committed any criminal, dishonest, fraudulent or malicious acts, errors, omissions or PERSONAL INJURIES." The appellees argue that although Steichen's acts of forgery and his conversion of settlement funds to his own use may be criminal,

dishonest, fraudulent, or malicious, it was not those acts upon which they obtained their judgments against Steichen.

In its order granting Fokken's motion for summary judgment, the district court stated the following:

> [Fokken] alleges in his Petition and . . . Steichen admits in his Answer previously filed herein that . . . Steichen accepted a settlement offer from State Farm Automobile Insurance Company without [Fokken's] authority and stipulated to a dismissal of his lawsuit, Steichen signed a Release and endorsed a settlement check without [Fokken's] knowledge or consent, which act [Fokken] claims herein constitute legal malpractice on the part of . . . Steichen, including, but not limited to . . . Steichen's: a) failure to communicate to [Fokken] all settlement offers; b) in accepting a settlement offer on [Fokken's] behalf without approval or consent of [Fokken]; c) in allowing a lawsuit to be dismissed with prejudice after the statute of limitations would bar any further action; and d) in breaching his professional fiduciary duty to act in the best interest of his client. The Court specifically recognizes all of the above allegations to be well-accepted theories of recovery under legal malpractice or professional negligence and constituting a departure below the generally accepted standard of care for attorneys practicing in Omaha, Douglas County, Nebraska, or similar communities.

Without further explanation, the district court went on to enter judgment against Steichen on the issue of liability.

In paragraph 3 of its order granting Miller's motion for summary judgment, the district court noted that the acts by Steichen allegedly constituting legal malpractice included, but were not limited to,

> Steichen's (a) failure to communicate to [Miller] all settlement offers; (b) in accepting a settlement offer on [Miller's] behalf without the approval or consent of [Miller]; (c) in placing [Miller's] signature on the Release and endorsing the settlement check without [Miller's] authority; (d) in allowing the lawsuit to be dismissed with prejudice after the statute of limitations would bar any further claims; and

(e) in breaching his professional and fiduciary duties to act in the best interests of his client.

The district court went on to find that Miller's motion for summary judgment on the issue of liability "should be granted in its entirety on the basis plead [sic] and set forth above in paragraph 3(a-e)."

With regard to Fokken, we read the district court's order as finding that the allegations that Steichen signed Fokken's name on the release and settlement check without Fokken's authorization were among those allegations constituting legal malpractice and, therefore, adjudicating Steichen of those actions. With regard to Miller, the court found that Steichen's unauthorized signature of Miller's name, among other acts, constituted legal malpractice. Thus, Steichen was adjudicated of those acts in Miller's case as well. Steichen's unauthorized endorsement of Miller's and Fokken's names constituted a dishonest act. Because the district court in both Fokken's and Miller's cases adjudicated Steichen of committing those dishonest acts, coverage is precluded under exclusion A of the Policy for the balance of the appellees' judgments against Steichen.

Remaining Assignments of Error

[11] Because we have determined that coverage under the Policy is precluded under exclusions A and L, we do not address Coregis' remaining assignments of error. An appellate court is not obligated to engage in an analysis that is not needed to adjudicate the controversy before it.[17]

CONCLUSION

For the reasons discussed above, we determine that the district court erred in granting the appellees' motion for summary judgment and in denying Coregis' motion for summary judgment. Accordingly, we reverse, and remand with directions to the district court to grant Coregis' motion for summary judgment.

Reversed and remanded with directions.

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[17] *State v. Sommer*, 273 Neb. 587, 731 N.W.2d 566 (2007).

STATE OF NEBRASKA, APPELLEE, V. NORMA E. LOPEZ, APPELLANT.

743 N.W.2d 351

Filed January 4, 2008. No. S-06-1251.

1. **Effectiveness of Counsel: Appeal and Error.** Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact. When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error. With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an appellate court reviews such legal determinations independently of the lower court's decision.
2. **Postconviction: Effectiveness of Counsel: Proof: Appeal and Error.** In order to establish a right to postconviction relief based on a claim of ineffective assistance of counsel at trial or on direct appeal, the defendant has the burden, in accordance with *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), to show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area. Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case. In order to show prejudice, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. The two prongs of this test, deficient performance and prejudice, may be addressed in either order.
3. **Effectiveness of Counsel: Pleas: Plea Bargains.** The standard established under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), applies to guilty pleas based on ineffective assistance of counsel and in cases involving the alleged failure to communicate the offer of a plea agreement.
4. **Effectiveness of Counsel: Presumptions.** In determining whether a trial counsel's performance was deficient, there is a strong presumption that such counsel acted reasonably.
5. **Effectiveness of Counsel: Appeal and Error.** When reviewing a claim of ineffective assistance of counsel, an appellate court will not second-guess reasonable strategic decisions by counsel.
6. **Effectiveness of Counsel: Plea Bargains.** In order to establish prejudice in a case in which a plea agreement was not communicated to the defendant, the defendant must demonstrate a reasonable probability that, but for counsel's deficiency, he or she would have accepted the plea.

Appeal from the District Court for Hall County: JAMES LIVINGSTON, Judge. Affirmed.

James R. Mowbray and Robert W. Kortus, of Nebraska Commission on Public Advocacy, for appellant.

Jon Bruning, Attorney General, and Erin E. Leuenberger for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

HEAVICAN, C.J.

INTRODUCTION

Norma E. Lopez was convicted of first degree murder and use of a weapon to commit a felony. Her convictions and sentences were affirmed by this court in *State v. Lopez*.[1] Lopez filed a verified motion for postconviction relief which was denied after an evidentiary hearing. Lopez appeals.

FACTS

The facts surrounding Lopez' convictions were set forth in *Lopez*. We supplement those facts as necessary.

> On March 25, 1994, the defendant had a party in her trailer home. During the course of the party, the defendant and a guest, Sotero Gandarilla, started to argue. The argument continued while the defendant and Gandarilla went into a bedroom in the defendant's home. The defendant's daughter was sitting in the bedroom, and the defendant asked the daughter to find the bullets for her gun. The daughter told the defendant that she did not know where the bullets were and then went to a neighbor's house for help.
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> Upon returning to the home of the defendant, the daughter heard a gunshot. Upon entering the bedroom, witnesses saw Gandarilla's body on the floor and the defendant holding a gun.[2]

At this point, the witnesses who saw Lopez standing over Sotero Gandarilla left Lopez' home. Lopez' daughter then returned with the neighbor. The neighbor testified that she asked Lopez "'[w]hy did you do it?'" Lopez responded that Gandarilla had told her that "she was not . . . the woman for [him]." The

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[1] *State v. Lopez*, 249 Neb. 634, 544 N.W.2d 845 (1996).

[2] *Id.* at 637, 544 N.W.2d at 850.

neighbor then helped Lopez and four of Lopez' children get back to the neighbor's home, where Lopez attempted to call relatives. According to the neighbor, Lopez was not able to dial the telephone, nor was Lopez able to provide to the neighbor the correct telephone number so that the neighbor could place the call for Lopez. The neighbor testified that Lopez then left the neighbor's home, apparently to retrieve a fifth daughter who remained in Lopez' home.

At about the same time, the record establishes that

> [t]he police [had] responded to a call of someone hearing a gunshot. An officer went to the defendant's home. The officer knocked and the defendant appeared. The officer asked if he could enter, and the defendant replied that he could not and that she would check the trailer for him. Soon after, the defendant returned to the front door of the trailer and stated to the officer, "He's dead; he's been shot." She initially refused to give the name of the victim.
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> The officer asked, "Can I come in and check?" to which the defendant answered, "Yes, you can." The officer found the body. The officer asked her the identity of the individual on the floor and the defendant's name and her date of birth, to which the defendant responded, "What? Do you think I shot him?" At that point, the officer informed the defendant of her *Miranda* rights. The officer asked if the defendant waived her rights and wanted to talk to him, to which she replied, "Yeah." It appeared to the officer that the defendant had been drinking and had apparently urinated on herself, but that she understood the questions and the situation. Several times during the preliminary investigation, the defendant told the officer, "Why don't you just go ahead and shoot me?" . . .
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> At that point, Lt. Rodger L. Williams arrived to take over the investigation. A high-powered rifle with one spent round in its chamber was found in the bedroom.
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> The defendant was jailed. An interview of the defendant by Williams took place the next morning at 8 o'clock at the jail at the defendant's request. The defendant signed a *Miranda* rights waiver. During the interview, Williams

> asked if the defendant knew why the shooting had occurred, to which the defendant stated, "Yes, because I shot him for no goddamn reason. Just for . . . being drunk and stupid I know." In response to a question as to whether the events of the previous evening occurred because the defendant had been drinking, she responded, "Oh, no, no, no. I have been that drunk before and never pulled a gun on my old man." The ammunition for the gun was found following a search pursuant to a search warrant.
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> It was later determined that "[t]he death of Sotero Gandarilla [was] due to a perforating gunshot wound to the neck, which caused a marked destruction of the soft tissue of the neck, severed the internal carotid artery, severed the internal and external jugular veins and, also, severed the larynx."[3]

At trial, Lopez was represented by two attorneys with the Hall County public defender's office. That office also represented Lopez on direct appeal. This court affirmed Lopez' convictions.

On April 1, 2003, Lopez filed a verified motion for postconviction relief. An amended motion was filed on March 5, 2004. That motion alleged ineffective assistance of counsel in several particulars. The district court granted an evidentiary hearing. At the hearing, depositions of Lopez and both trial counsel were introduced into evidence. In addition, Lopez and lead counsel testified. On October 17, 2006, Lopez' motion was denied. In its order, the district court specifically addressed Lopez' contention that a plea agreement was not communicated to her, finding that Lopez suffered no prejudice from trial counsel's deficiencies. As to Lopez' other allegations, the district court generally concluded that it could not "find from the evidence that counsel's performance was deficient and that any deficient performance prejudiced the defense."

ASSIGNMENTS OF ERROR

On appeal, Lopez argues that the district court erred in denying her motion for postconviction relief. In particular, Lopez

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[3] *Id.* at 637-38, 544 N.W.2d at 850-51.

contends, restated and renumbered, that the district court erred by not finding that her trial counsel was ineffective in (1) failing to adequately inform her of plea offers and in failing to pursue plea offers on her behalf, (2) failing to object to the State's reliance of Lopez' invocation of her right to remain silent, (3) failing to challenge the State's contention that Lopez had animosity or malice against Gandarilla, (4) failing to adequately present opening statements, (5) failing to properly challenge the testimony of the State's fingerprint evidence expert and in failing to present expert testimony to counter the State's expert, and (6) failing to adequately advise Lopez of her right to testify in her own behalf.

STANDARD OF REVIEW

[1] Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact.[4] When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error.[5] With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*,[6] an appellate court reviews such legal determinations independently of the lower court's decision.[7]

ANALYSIS

[2,3] On appeal, Lopez assigns as error that the district court failed to find that her trial counsel was ineffective in several particulars. In order to establish a right to postconviction relief based on a claim of ineffective assistance of counsel at trial or on direct appeal, the defendant has the burden, in accordance with *Strickland*,[8] to show that counsel's performance was deficient; that is, counsel's performance did not equal that of a

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[4] *State v. Sims*, 272 Neb. 811, 725 N.W.2d 175 (2006).

[5] *Id.*

[6] *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

[7] *State v. Sims, supra* note 4.

[8] *Strickland v. Washington, supra* note 6.

lawyer with ordinary training and skill in criminal law in the area.[9] Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case.[10] In order to show prejudice, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.[11] The two prongs of this test, deficient performance and prejudice, may be addressed in either order. This standard also applies to guilty pleas based on ineffective assistance of counsel[12] and in cases involving the alleged failure to communicate the offer of a plea agreement.[13]

[4,5] In determining whether a trial counsel's performance was deficient, there is a strong presumption that such counsel acted reasonably.[14] When reviewing a claim of ineffective assistance of counsel, an appellate court will not second-guess reasonable strategic decisions by counsel.[15]

Failure to Communicate Plea Agreement.

Lopez first argues that she received ineffective assistance of trial counsel with respect to plea negotiations. In particular, Lopez contends that a plea agreement for second degree murder was not communicated to her.

At the postconviction evidentiary hearing, the parties stipulated that an offer of second degree murder and use of a weapon had been communicated to defense counsel prior to trial. In overruling Lopez' motion with respect to this allegation, the district court, in keeping with this stipulation, found that Lopez' trial counsel failed to convey that agreement to Lopez. However,

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[9] *State v. Sims, supra* note 7.

[10] *Id.*

[11] *Id.*

[12] *Hill v. Lockhart*, 474 U.S. 52, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985). See, also, *State v. Malcom*, 12 Neb. App. 432, 675 N.W.2d 728 (2004).

[13] *Magana v. Hofbauer*, 263 F.3d 542 (6th Cir. 2001); *Engelen v. U.S.*, 68 F.3d 238 (8th Cir. 1995); *Toro v. Fairman*, 940 F.2d 1065 (7th Cir. 1991); *Dew v. State*, 843 N.E.2d 556 (Ind. App. 2006).

[14] *State v. Miner*, 273 Neb. 837, 733 N.W.2d 891 (2007).

[15] *State v. Canbaz*, 270 Neb. 559, 705 N.W.2d 221 (2005).

the district court concluded that Lopez was not prejudiced by this failure, as Lopez had not demonstrated that she would have accepted the offer.

At the evidentiary hearing, lead counsel testified that he recalled the State's making one plea offer for first degree murder in which the State would decline to pursue the death penalty. Lead counsel indicated he did not believe this offer was a good offer, as he found it unlikely that Lopez would be sentenced to death, but he brought the offer to Lopez. He recalled that Lopez thought about the offer for a few days, but indicated that Lopez was "adamant" about rejecting the offer. Second chair counsel, in his deposition, echoed this, testifying that Lopez wanted to go to trial because she did not remember what happened at the time of the shooting. According to lead counsel, he and second chair counsel suggested later that Lopez offer to plead guilty to manslaughter and use of a weapon, but Lopez refused to let counsel make this offer to the State and insisted upon going to trial.

Both counsel also testified that Lopez seemed to generally understand what was going on in connection with the charges filed against her. Lead counsel testified that he attempted to discuss with Lopez the events surrounding the murder, but that Lopez always indicated she did not remember what had happened. Lead counsel indicated that he met with Lopez once or twice a week for about an hour each time. It is not clear from the record, but it appears these meetings occurred over a somewhat lengthy period of time prior to trial. Lead counsel also testified that he went over police reports with Lopez; provided to Lopez copies of depositions taken in the case; and, as a matter of course, would have discussed the State's evidence and witnesses against Lopez in general terms, including forensic evidence. Lead counsel also indicated it was his recollection that Lopez was present at the formal hearings held in the case, which included a suppression motion.

Lopez testified that only one offer, which involved serving between 20 and 40 years in prison, was communicated to her. Lopez specifically testified that no offer to plead guilty to second degree murder was ever communicated to her and that if such had been offered, she would have accepted.

Lopez generally testified that she had expressed a desire to know what had happened at the time of Gandarilla's death, but that if she could have found out without going to trial, that would have been acceptable. Lopez testified that she received no copies of police reports or depositions and did not recall attending any hearings in the case. Lopez also indicated that even at the time of the postconviction evidentiary hearing, she was uncertain as to the difference between no contest and guilty pleas, and that had she understood the difference before trial, she would have pled no contest or guilty.

As an initial matter, we conclude that the district court's finding that Lopez' counsel failed to communicate the plea agreement in question to Lopez was not clearly erroneous. We further conclude that such failure was deficient as a matter of law. However, we also agree with the district court that Lopez has not demonstrated that she would have accepted the plea agreement for second degree murder. As such, Lopez cannot show she was prejudiced by counsel's failure to communicate the plea agreement.

The prejudice inquiry in cases involving plea agreements focuses upon whether counsel's ineffective performance affected the outcome of the plea process.[16] Various standards exist for determining whether a defendant has made a showing of prejudice. For example, in the Eighth Circuit, "[t]o establish prejudice . . . the movant must show that, but for his counsel's advice, he would have accepted the plea. To command an evidentiary hearing, the movant must present some credible, nonconclusory evidence that he would have pled guilty had he been properly advised."[17]

However, the Seventh Circuit, citing *Strickland*, requires a defendant to "establish through objective evidence that there is a reasonable probability that, but for counsel's advice, he would have accepted the plea."[18] The Sixth Circuit largely concurs with the Seventh Circuit's standard, except it notes that

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[16] See *Hill v. Lockhart, supra* note 12.

[17] *Engelen v. U.S., supra* note 13, 68 F.3d at 241.

[18] *Toro v. Fairman*, *supra* note 13, 940 F.2d at 1068.

"*Strickland* . . . only requires that a defendant demonstrate that there is a 'reasonable probability' that the result of the proceeding would have been different. The Supreme Court has imposed no requirement that the defendant meet his burden of proof through objective evidence."[19]

[6] We concur with the Sixth Circuit's reading of *Strickland* and hold that the defendant must demonstrate a "reasonable probability" that, but for counsel's deficiency, he or she would have accepted the plea. We conclude, however, that Lopez cannot meet this standard.

A review of the record reveals that Lopez testified she did not understand the difference between guilty and no contest pleas. Lopez contends that had she understood that difference, she would have pled guilty or no contest to the plea agreement for second degree murder offered by the State. Lopez stated during her testimony that she did not remember the shooting and thought trial was the only way to find out what happened. Lopez claimed that trial counsel did not share any of the State's case with her and that had they done so, she would have accepted that version of events and not gone to trial.

However, evidence was introduced by the State that contradicts Lopez' assertion that she would have pled guilty to second degree murder. Both counsel testified that Lopez rejected one plea agreement and refused to let them approach the State with another suggested agreement—this one for manslaughter. They both testified that Lopez wanted to go to trial, with lead counsel testifying that she was "adamant" about it.

Moreover, Lopez' contention that she was not informed as to the State's case against her is contradicted by lead counsel's testimony. He testified that he met with Lopez, provided to her copies of the depositions taken in the case, and outlined the State's case and evidence against her. He further testified that Lopez was present at the formal hearings in her case, a fact confirmed by a review of the various bills of exceptions from those hearings.

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[19] *Magana v. Hofbauer, supra* note 13, 263 F.3d at 547 n.1. See, also, *Dew v. State, supra* note 13.

The district court found Lopez' contention that she would have pled guilty to be not credible. We conclude that this finding of fact was not clearly erroneous. Lopez did not meet her burden—she has not shown there was a reasonable probability that she would have accepted the second degree murder plea agreement offered by the State. As such, Lopez' first assignment of error is without merit.

Right to Remain Silent.

Lopez next argues that the State improperly relied upon her invocation of her right to remain silent and that her counsel was ineffective for failing to object accordingly. Lopez argues that the State's actions violated *Doyle v. Ohio*.[20]

In *Doyle*, the U.S. Supreme Court held that the State may not "seek to impeach a defendant's exculpatory story, told for the first time at trial, by cross-examining the defendant about his failure to have told the story after receiving *Miranda* warnings at the time of his arrest."[21] In discussing *Doyle,* this court has noted also that *Doyle* stands for the proposition that "a defendant's postarrest, post-*Miranda* silence is 'insolubly ambiguous' as to whether the defendant is guilty or merely exercising his rights in accordance with the implicit assurance in the *Miranda* warnings that 'silence will carry no penalty.'"[22]

The State, in its closing arguments, made the following comments of which Lopez now complains:

> When Sergeant Ochsner reads her her Miranda rights, she says, "I understand them." No evidence to the contrary.
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> When she gets to the jail, if you'll remember testimony of the Corrections Officer Gorman and Lieutenant Castleberry, Corrections Officer Gorman tells you that when they are trying to ask a question and she won't answer, what does she do, in fact? If Castleberry asks her a question, she turns around and faces Gorman and vice versa.

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[20] *Doyle v. Ohio*, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976).

[21] *Id.*, 426 U.S. at 611.

[22] *State v. Harms*, 263 Neb. 814, 822-23, 643 N.W.2d 359, 369 (2002).

> She knows she doesn't have to answer questions, and she won't . . . .

The State contends that these statements in closing arguments were simply a proper comment on Sgt. Ronald Gorman's testimony at trial that when Lopez "'was originally brought in, she would not answer any questions'" and "'[i]f you did ask her [a] question, she would just turn away from you and not talk.'"[23] The State argues that this testimony was not objected to at trial and such is not raised now, thus Lopez has waived any error. Alternatively, the State contends that the statement in closing was not a *Doyle* violation or that any error which may have occurred was harmless.

As an initial matter, we disagree that the statements in closing were simply a proper comment on the evidence. To the extent that the prosecutor noted the content of the testimony of Lt. James Castleberry and corrections officer Cynthia Gorman, the statements can be considered a proper comment on the evidence. However, the prosecutor also noted that Lopez "knows she doesn't have to answer questions, and she won't." This statement could be read as inviting the jury to speculate as to the reasons behind Lopez' silence.

We also disagree with the State that the prosecutor's comment in closing was not a *Doyle* violation. The apparent basis for the State's argument is that in *Doyle*, the defendant's silence was not admissible to impeach the defendant's testimony at trial. However, in this case, Lopez' silence was not used to impeach her testimony at trial, since she did not testify.

Though *Doyle* did involve the impeachment of a defendant's trial testimony, we do not believe it is limited to such circumstances. In *Wainwright v. Greenfield*[24]—a case in which the defendant did not testify—the prosecution was prohibited from relying on a defendant's postarrest, post-*Miranda* silence as substantive evidence of the defendant's sanity. Moreover, the reasoning behind both *Doyle* and *Wainwright* is the fundamental unfairness implicit in promising a defendant his or her silence

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[23] Brief for appellee at 35.

[24] *Wainwright v. Greenfield*, 474 U.S. 284, 106 S. Ct. 634, 88 L. Ed. 2d 623 (1986).

will not be used against him or her, then essentially using that silence against the defendant. We conclude that the State's comments in closing were a violation of *Doyle.*

Assuming that Lopez' counsel was deficient in failing to object to the State's violation of *Doyle*, Lopez still cannot show a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. Evidence beyond a reasonable doubt was presented at trial showing that Lopez was guilty of first degree murder. There was testimony that Lopez and Gandarilla had been arguing before the shooting. Lopez' daughter testified that she was asked by her mother to "find the bullets." Lopez herself made certain statements suggesting her guilt and informed her neighbor that she shot Gandarilla because he told her that she was "not the woman for [him]." In addition, police testified that Lopez indicated she shot Gandarilla for "no good reason," but because she was "drunk and stupid." Lopez further indicated that she had "been that drunk before" but had "never pulled a gun on [her] old man." Lopez has not shown that she was prejudiced by any deficiency by counsel in failing to object to any *Doyle* violation made by the State. As such, Lopez cannot show that counsel was ineffective. Lopez' second assignment of error is without merit.

Remaining Assignments of Error.

Lopez makes several other contentions regarding the alleged ineffectiveness of counsel. We have reviewed the record and conclude those allegations are also without merit. We therefore reject Lopez' third through sixth assignments of error.

CONCLUSION

For the reasons stated above, we conclude that Lopez' counsel was not ineffective and, accordingly, affirm the district court's denial of postconviction relief.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
JOHN PIEPER, APPELLANT.
743 N.W.2d 360

Filed January 4, 2008. No. S-07-057.

1. **Criminal Law: Motions for New Trial: Appeal and Error.** In a criminal case, a motion for new trial is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed.
2. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below.
3. **Constitutional Law: Statutes: Appeal and Error.** The constitutionality of a statute is a question of law, regarding which the Nebraska Supreme Court is obligated to reach a conclusion independent of the determination reached by the trial court.
4. **Sentences: Appeal and Error.** A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court.
5. **Criminal Law: Pretrial Procedure.** Discovery in a criminal case is, in the absence of a constitutional requirement, controlled by either a statute or a court rule.
6. **Evidence: Waiver: Appeal and Error.** A party who fails to make a timely objection to evidence waives the right on appeal to assert prejudicial error concerning the evidence received without objection.
7. **Appeal and Error.** When an issue is raised for the first time in an appellate court, it will be disregarded inasmuch as a lower court cannot commit error in resolving an issue never presented and submitted to it for disposition.
8. **Motions for New Trial: Effectiveness of Counsel.** Ineffective assistance of counsel is not a ground upon which a defendant may move for new trial under Neb. Rev. Stat. § 29-2101 (Cum. Supp. 2006).
9. **Double Jeopardy: Habitual Criminals: Sentences.** Nebraska's habitual criminal statute, Neb. Rev. Stat. § 29-2221 (Cum. Supp. 2006), does not violate the Double Jeopardy Clause because an enhanced sentence under the provisions of the habitual criminal laws is not a new jeopardy or additional penalty for the same crime. It is simply a stiffened penalty for the latest crime which is considered to be an aggravated offense because it is a repetitive one.

Appeal from the District Court for Lancaster County: KAREN FLOWERS, Judge. Affirmed.

Jessica L. Milburn for appellant.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MILLER-LERMAN, J.

NATURE OF CASE

John Pieper was convicted in the district court for Lancaster County of first degree assault and false imprisonment in the first degree. Pieper appeals his convictions and his sentencing as a habitual criminal. We affirm.

STATEMENT OF FACTS

The State charged Pieper with first degree assault, first degree sexual assault, and false imprisonment in the first degree. The State amended the information to charge Pieper as a habitual criminal. The charges arose out of incidents that occurred on July 11 and 12, 2004, and involved Pieper; a codefendant, Jeremiah Croghan; and the victims, Vernon French and A.N. Pieper, Croghan, French, and A.N. testified at trial and gave accounts of the incidents which varied in certain respects. There is no claim that the evidence is insufficient, and taking the evidence favorably to the State, we summarize the evidence as follows.

In July 2004, French was living with his girlfriend, A.N. They were in their apartment on the night of July 11, listening to music. Late that night, Croghan and Pieper came to the door of the apartment and told French and A.N. that they had heard the music and wanted to introduce themselves. Croghan had recently moved into an apartment down the hall.

Accounts vary regarding which persons drank whiskey or beer, took Xanax, or smoked marijuana that night. At some point in the evening, arguments ensued and French was beaten. French was hospitalized for 5 to 7 days with injuries from the assault. Pieper was convicted of the assault in this case. There was testimony that at one point, Pieper held a knife to A.N.'s throat and took her to Croghan's apartment. Pieper was convicted of false imprisonment with respect to A.N. There was also testimony that A.N. was sexually assaulted. Pieper was found not guilty of this charge.

A tape recording of an interview French gave to a police officer was entered into evidence during the officer's testimony, but no portion of the tape recording was played to the jury. A transcription of the tape recording of another police officer's interview with French was also entered into evidence during that police officer's testimony, but no part of the transcription was read to the jury. Pieper's counsel did not object to admission of the tape or the transcription.

A tape recording of an interview A.N. gave to a police officer was marked as an exhibit, but there is no indication in the record that the tape was offered or admitted into evidence. No portion of the tape recording was played to the jury.

Croghan testified at Pieper's trial in a manner which was generally unfavorable to Pieper. Included in that testimony was a description of Pieper's hitting French and threatening French with a knife. In his initial statements to police on July 14, 2004, Croghan's recounting of events was generally similar to his trial testimony. In contrast to the trial testimony, on May 2, 2005, Croghan gave a deposition which was more favorable to Pieper and painted a picture in which French had been an aggressor and Croghan had kicked French. Weeks before Pieper's trial, on February 22, 2006, the prosecutor in this case asked a police officer to contact Croghan to ask how he would testify at trial. Prior to the conversation, the officer thought that Croghan "was going to claim all responsibility of wrong doing [sic] in this case." However, Croghan told the officer that he had lied in his deposition because he was being threatened by Pieper's associates. Croghan told the officer that at trial, he planned to tell the truth, which more closely tracked his original statement to police in which Croghan stated that Pieper had assaulted French. The officer called the prosecutor on February 22 to orally report on the conversation, but the officer did not prepare a written report of the conversation until April 11, after Pieper's trial had begun. On April 12, the third day of Pieper's trial, and prior to Croghan's testimony, Pieper moved to dismiss based on prosecutorial misconduct because he had not been provided a copy of the officer's report of the February 22 conversation with Croghan until that day. The court overruled

the motion to dismiss. Pieper then made a motion for mistrial, which the court also overruled.

Pieper testified in his own defense. In his testimony, Pieper stated that French had been an aggressor and that it was Croghan who had hit French. Pieper denied that he ever punched, kicked, or stomped on French.

The jury returned a verdict on April 18, 2006, finding Pieper guilty of first degree assault and false imprisonment but not guilty of sexual assault. On April 21, Pieper filed a motion for new trial based on general allegations of irregularities and misconduct. On May 3, Pieper filed a pro se amended motion for new trial in which he made more specific allegations, including allegations of prosecutorial misconduct and ineffective assistance of counsel. Pieper also filed a pro se motion to dismiss counsel and appoint new counsel. The court sustained Pieper's motion for new counsel and appointed new counsel on May 12. On May 25, Pieper filed a third amended motion for new trial, asserting irregularities, misconduct, and ineffective assistance of counsel. Hearings were held, and on November 27, the court overruled the motion for new trial.

An enhancement hearing based on the habitual criminal allegation was held December 12, 2006. At the enhancement hearing, Pieper objected on the basis that "notwithstanding Nebraska Supreme Court precedent," enhancement pursuant to the habitual criminal statute, Neb. Rev. Stat. § 29-2221 (Cum. Supp. 2006), violated the Double Jeopardy Clauses of the Nebraska and federal Constitutions. The court overruled the objection and found Pieper to be a habitual criminal. The court sentenced Pieper to imprisonment for 10 to 20 years on each of the two convictions, with the sentences to be served consecutive to one another.

Pieper appeals.

ASSIGNMENTS OF ERROR

Pieper asserts that the district court erred in (1) failing to grant his motion for new trial on the basis that the State failed to timely disclose to the defense Croghan's statement on February 22, 2006, that his testimony at trial would be consistent with his original statement to the police and contrary to his deposition,

(2) admitting tape recordings and transcriptions of the victims' statements into evidence without playing the tapes during trial and without restricting jury access to the tapes and transcriptions during deliberations, (3) failing to grant his motion for new trial on the basis that he received ineffective assistance of trial counsel, (4) failing to conclude that the habitual criminal statute violates the Double Jeopardy Clause, and (5) imposing excessive sentences.

STANDARDS OF REVIEW

[1] In a criminal case, a motion for new trial is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed. *State v. Archie*, 273 Neb. 612, 733 N.W.2d 513 (2007).

[2] Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below. *State v. Gozzola*, 273 Neb. 309, 729 N.W.2d 87 (2007).

[3] The constitutionality of a statute is a question of law, regarding which the Nebraska Supreme Court is obligated to reach a conclusion independent of the determination reached by the trial court. *State v. Archie, supra.*

[4] A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court. *Id.*

ANALYSIS

The District Court Did Not Err in Overruling Pieper's Motion for New Trial Because the Prosecution Did Not Have an Obligation to Disclose a Nonexculpatory Pretrial Conversation With a Witness.

As his first assignment of error, Pieper asserts that the trial court erred when it overruled his motion for new trial in which he claimed that the State failed to timely disclose to the defense the officer's February 22, 2006, conversation with Croghan. We determine that the State had no obligation to disclose the conversation in this case and that therefore, the court did not abuse its discretion when it did not grant a new trial on such basis.

[5] We note initially that under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), due process requires the State to disclose exculpatory evidence to a defendant. See *State v. Lykens*, 271 Neb. 240, 710 N.W.2d 844 (2006). However, the State is not under a constitutional duty to disclose all information that might affect the jury's verdict, *State v. Phelps*, 241 Neb. 707, 490 N.W.2d 676 (1992), and discovery in a criminal case is, in the absence of a constitutional requirement, controlled by either a statute or a court rule, *id.* At issue here is Croghan's verbal statement to a police officer that he intended to testify in a manner unfavorable to Pieper. Such statement was not exculpatory to Pieper. Nevertheless, Pieper claims that the State had an obligation to disclose its knowledge regarding Croghan's intentions and that such obligation stemmed from discovery statutes and the court's discovery order. We determine that neither the statute nor the court's discovery order support Pieper's claim.

Pieper filed a motion for discovery on December 23, 2004. It did not specifically request the type of police witness inquiry at issue here. The court granted the motion in an order in which it stated, "Discovery is granted to all parties to [the] extent allowed by statute." Discovery statute Neb. Rev. Stat. § 29-1912 (Reissue 1995) controls our analysis. Section 29-1912 provides in part:

> (1) When a defendant is charged with a felony or when a defendant is charged with a misdemeanor or a violation of a city or village ordinance for which imprisonment is a possible penalty, he or she may request the court where the case is to be tried, at any time after the filing of the indictment, information, or complaint to order the prosecuting attorney to permit the defendant to inspect and copy or photograph:
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> (a) The defendant's statement, if any. . . .
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> (b) The defendant's prior criminal record, if any;
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> (c) The defendant's recorded testimony before a grand jury;
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> (d) The names and addresses of witnesses on whose evidence the charge is based;

> (e) The results and reports of physical or mental examinations, and of scientific tests, or experiments made in connection with the particular case, or copies thereof; and
>
> (f) Documents, papers, books, accounts, letters, photographs, objects, or other tangible things of whatsoever kind or nature which could be used as evidence by the prosecuting authority.

Pieper does not claim that the February 22, 2006, interview of Croghan fits any particular category listed in § 29-1912, although he does suggest knowledge of it would have been "useful" to the defense. Brief for appellant at 36. He further suggests that the reference to "information within the possession, custody, or control of the state" found in another discovery statute, Neb. Rev. Stat. § 29-1914 (Reissue 1995), expands the listings found in § 29-1912 to include "information" in general. We reject this argument. By its terms, § 29-1914 limits rather than expands the scope of discovery orders issued under § 29-1912 to "items or information within the possession, custody, or control of the state." Section 29-1914 does not add a new category, to wit "information," subject to discovery but instead serves to circumscribe the discovery obligation of the State. Given the discovery request and the court's discovery order in this case, which granted discovery to the extent allowed by statute, the State was not obligated to disclose its conversation with a witness in preparation for trial.

Pieper moved for a new trial on the additional basis that the State's providing the report of the February 22, 2006, conversation on the third day of trial was untimely. We conclude that the court did not abuse its discretion in overruling the new trial motion on such basis. With respect to the timeliness of the production of the officer's report, we note that the written report was not prepared until the second day of trial and that the State provided the report to the defense the next day, prior to Croghan's testimony at trial. After receiving the report, Pieper moved to dismiss and for a mistrial. When the motions were overruled, Pieper did not move for a continuance.

It is apparent from the record that prior to trial, Pieper was aware that Croghan had given conflicting accounts of the events at issue and that one version was more favorable than the other.

Given this knowledge of disparate versions, the possibility that Croghan's trial testimony could be consistent with his original statement was apparent to defense counsel.

We determine that given the discovery request, the discovery order, the discovery statutes, and Pieper's knowledge that Croghan had already given conflicting versions of events, the State was not obligated to provide to the defense its understanding of the officer's February 22, 2006, conversation with Croghan. We therefore conclude that the court did not abuse its discretion by overruling Pieper's motion for new trial on this basis.

Pieper Did Not Object to the Admission of Tape Recordings and Transcriptions of the Victims' Statements to Police and Did Not Preserve the Issue for Appeal.

As his second assignment of error, Pieper asserts that the court erred in admitting tape recordings and transcriptions of tape recordings of police interviews with the victims, French and A.N. We conclude that because Pieper failed to object to admission of these items, he has failed to preserve this issue for appeal.

A tape recording of a police interview with French and the transcription of a tape recording of another police interview with French were admitted into evidence. The tape recording was not played to the jury, and the transcription was not read to the jury. Although there is no indication in the record that the jury listened to the tape recording or read the transcription during deliberations, it appears that both pieces of evidence were available to the jury. For completeness, we note that in his appellate argument, Pieper also references a tape recording of a police interview of A.N. that was marked as an exhibit; however, there is no indication in the record that the A.N. tape recording was offered or admitted into evidence.

[6,7] A party who fails to make a timely objection to evidence waives the right on appeal to assert prejudicial error concerning the evidence received without objection. *State v. Cook*, 266 Neb. 465, 667 N.W.2d 201 (2003). When an issue is raised for the first time in an appellate court, it will be disregarded inasmuch as a lower court cannot commit error in resolving an

issue never presented and submitted to it for disposition. *State v. Dockery*, 273 Neb. 330, 729 N.W.2d 320 (2007). Pieper did not object to the admission of the tape recording and the transcription and did not present the issue to the trial court. We therefore reject Pieper's second assignment of error.

Claims of Ineffective Assistance of Counsel May Not Be Raised in a Motion for New Trial.

As his third assignment of error, Pieper asserts that the court erred in overruling his motion for new trial in which, through substitute counsel, Pieper claimed his initial trial counsel had provided ineffective assistance. The State argues that ineffective assistance of counsel is not a proper statutory ground for a motion for new trial. We agree with the State and conclude that the court did not err in overruling the motion for new trial on such basis.

The statute governing motions for new trial, Neb. Rev. Stat. § 29-2101 (Cum. Supp. 2006), provides as follows:

> A new trial, after a verdict of conviction, may be granted, on the application of the defendant, for any of the following grounds affecting materially his or her substantial rights: (1) Irregularity in the proceedings of the court, of the prosecuting attorney, or of the witnesses for the state or in any order of the court or abuse of discretion by which the defendant was prevented from having a fair trial; (2) misconduct of the jury, of the prosecuting attorney, or of the witnesses for the state; (3) accident or surprise which ordinary prudence could not have guarded against; (4) the verdict is not sustained by sufficient evidence or is contrary to law; (5) newly discovered evidence material for the defendant which he or she could not with reasonable diligence have discovered and produced at the trial; (6) newly discovered exculpatory DNA or similar forensic testing evidence obtained under the DNA Testing Act; or (7) error of law occurring at the trial.

We note that ineffective assistance of counsel is not one of the enumerated grounds upon which a defendant may move for a new trial under § 29-2101.

[8] Pieper argues on appeal that the procedure of raising claims of ineffective assistance of counsel in a motion for new trial was "allowed" by this court in earlier cases and should be permitted in the instant case. Reply brief for appellant at 3. Pieper cites *Hawk v. Olson*, 146 Neb. 875, 22 N.W.2d 136 (1946), and *State v. Whiteley*, 234 Neb. 693, 452 N.W.2d 290 (1990). In *Hawk*, this court held that due process issues, including a claim that the defendant had been deprived of effective assistance of counsel, were "issues which are not justiciable in a habeas corpus proceeding in this state." 146 Neb. at 881, 22 N.W.2d at 140. In reaching such conclusion, this court stated in dicta that the issues "could have been presented and determined by the trial court, in the first instance, on a motion for a new trial." *Id.* In *Whiteley*, this court held that the trial court did not abuse its discretion in overruling a motion for new trial which raised issues of ineffective assistance of counsel. However, this court did not, in either *Hawk* or *Whiteley*, cite to § 29-2101 or analyze the propriety or prudence of raising a claim of ineffective assistance in a motion for new trial made under § 29-2101. Because we conclude that ineffective assistance of counsel is not a ground upon which a defendant may move for new trial under § 29-2101, to the extent that *Hawk* and *Whiteley* imply that an ineffective counsel claim can be raised on a motion for new trial, they are disapproved.

We believe that in addition to the fact that a claim of ineffective counsel is not an enumerated basis for a new trial motion under § 29-2101, such claim is not suited to a motion for new trial. Due to the absence of a record relating to issues such as defense counsel's trial strategy, a separate evidentiary hearing would be required on the ineffectiveness claim, thus postponing entry of judgment. A defendant exploring ineffectiveness of trial counsel immediately after the trial could run the risk of a procedural bar if not all ineffectiveness claims were raised and developed. Defendants are not without remedies. Claims of ineffective assistance of counsel are available on direct appeal and in postconviction proceedings. See, *State v. York*, 273 Neb. 660, 731 N.W.2d 597 (2007); Neb. Rev. Stat. § 29-3001 (Reissue 1995). However, they are neither authorized nor suited to the immediate aftermath of a trial in a motion for new trial.

Because ineffective assistance of counsel is not a proper ground for a motion for new trial under § 29-2101, we conclude that the court did not abuse its discretion by overruling the motion for new trial on such basis.

Nebraska's Habitual Criminal Statute Does Not Violate the Double Jeopardy Clause.

As his fourth assignment of error, Pieper asserts that the court erred in rejecting his assertion that the habitual criminal statute, § 29-2221, violates the Double Jeopardy Clauses of the federal and Nebraska Constitutions. We conclude that the court did not err in rejecting such assertion.

[9] In raising the constitutional challenge to the habitual criminal statute at the enhancement hearing, Pieper's counsel acknowledged that the challenge was made "notwithstanding Nebraska Supreme Court precedent stating double jeopardy principles do not apply." This court has previously rejected double jeopardy challenges to Nebraska's habitual criminal statute and has long held that the statute does not violate the Double Jeopardy Clause because "an enhanced sentence under the provisions of the habitual criminal laws is not a new jeopardy or additional penalty for the same crime. It is simply a stiffened penalty for the latest crime which is considered to be an aggravated offense because it is a repetitive one." *Addison v. Parratt*, 208 Neb. 459, 462, 303 N.W.2d 785, 787 (1981). See, also, *State v. Goodloe*, 197 Neb. 632, 250 N.W.2d 606 (1977), *disapproved on other grounds, State v. Clifford*, 204 Neb. 41, 281 N.W.2d 223 (1979).

Pieper makes no new argument that would cause us to reconsider such precedent. The district court therefore did not err in rejecting Pieper's constitutional challenge to the habitual criminal statute.

District Court Did Not Impose Excessive Sentences.

As his final assignment of error, Pieper asserts that the court imposed excessive sentences. The sentences were within statutory limits, and we conclude that the court did not abuse its discretion in the sentences it imposed.

A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court. *State v. Archie*, 273 Neb. 612, 733 N.W.2d 513 (2007). Pieper was convicted of first degree assault under Neb. Rev. Stat. § 28-308 (Reissue 1995) and false imprisonment in the first degree under Neb. Rev. Stat. § 28-314 (Cum. Supp. 2006). First degree assault is a Class III felony, § 28-308(2), and false imprisonment is a Class IIIA felony, § 28-314(2). The maximum sentence of imprisonment is 20 years for a Class III felony and 5 years for a Class IIIA felony. Neb. Rev. Stat. § 28-105(1) (Cum. Supp. 2006). However, due to prior felony convictions, Pieper was found to be a habitual criminal, and under § 29-2221, one found to be a habitual criminal is to be punished by imprisonment for a mandatory minimum term of 10 years and a maximum term of not more than 60 years for each felony conviction. Pieper was sentenced to imprisonment for 10 to 20 years on each count with the sentences to be served consecutive to one another. Therefore, Pieper's sentences were within statutory limits.

Pieper's main argument is that the court erroneously ordered that his sentences be served consecutive to one another because the court mistakenly thought it was required to do so. Pieper notes that when defense counsel urged that the sentences be ordered to be served concurrently, the court stated, "while some might think that I have a lot of discretion in this matter, I really don't think I do." We do not read the court's comments to indicate that the court thought it was mandatory that the sentences be served consecutive to one another. The court continued by stating, "while it would be tempting to make the sentences concurrent, because they do arise perhaps out of the same event, what I have are two separate victims and really two very separate crimes, at least as the jury determined them." The court then "decline[d] that invitation" to order the sentences to be served concurrently. We read the court's comments to indicate that the court knew it had discretion to order the sentences to be served concurrently but decided that consecutive sentences were appropriate under the circumstances.

Although Pieper argues that he did not have a history of violence, we note that Pieper had a significant criminal history, including felony convictions for burglary and theft. We also

note that the victims in this case suffered severe physical and emotional injuries as a result of the crimes and that French's injuries in particular were life threatening. We finally note that the sentences were at the lower end of the range mandated by the habitual criminal statute. We therefore conclude that the court did not abuse its discretion in imposing consecutive sentences of 10 to 20 years' imprisonment on each count.

CONCLUSION

Having considered and rejected each of Pieper's assignments of error, we affirm his convictions and sentences for first degree assault and false imprisonment in the first degree.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
JESSICA M. REID, APPELLANT.
743 N.W.2d 370

Filed January 4, 2008. No. S-07-303.

1. **Sentences: Appeal and Error.** A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court.
2. **Judgments: Words and Phrases.** An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.
3. **Sentences.** When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the violence involved in the commission of the crime.
4. ____. In imposing a sentence, the sentencing court is not limited to any mathematically applied set of factors.
5. ____. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.

Appeal from the District Court for Cass County: RANDALL L. REHMEIER, Judge. Affirmed.

Thomas J. Olsen, of Troia & Olsen, for appellant.

Jon Bruning, Attorney General, George R. Love, and Andy Maca, Senior Certified Law Student, for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

CONNOLLY, J.

Under a plea agreement, Jessica M. Reid pled guilty to two counts of second degree murder for the deaths of Wayne and Sharmon Stock. The district court sentenced Reid to not less than life imprisonment nor more than life imprisonment for each murder. The court ordered Reid to serve the sentences consecutively. Reid appeals, assigning that her sentences are excessive. We affirm.

BACKGROUND

Before embarking on this crime spree, Reid and her codefendant and boyfriend, Gregory D. Fester II, were living together in Horicon, Wisconsin. On April 15, 2006, they left Wisconsin. After stealing and abandoning two vehicles, they stole money, a 12 gauge shotgun, ammunition, and another vehicle from a Wisconsin home. They then drove to Iowa, planning to rob a few houses on their way to Arizona. They broke into two more houses in Iowa. They vandalized the first house and stole a .410 shotgun and ammunition and stole about $300 from the second house. Later that night, they decided to burglarize the Stocks' rural home in Cass County, Nebraska.

Fester entered the first floor through a window and opened a door for Reid. Fester carried the 12 gauge shotgun, and Reid carried the .410 shotgun. Reid stated to law enforcement that they did not stay on the first floor long before heading upstairs. She heard snoring coming from upstairs and removed her coat so she would not make any noise. She then followed Fester upstairs. According to Reid's account, Fester turned on the Stocks' bedroom light and then came back into the hallway and asked her what to do. She replied, "do something." Fester then ran back into the room and shot Wayne Stock in the leg while he was in bed or getting out of bed. Wayne Stock then struggled with Fester over the 12 gauge shotgun. While they were struggling, Reid shot Wayne Stock with the .410 shotgun.

She stated that Wayne Stock looked her directly in the eyes and that she then pulled the trigger. She further stated she shot Wayne Stock above his right eye and he fell forward. After Wayne Stock fell, Fester jumped over his body and shot him in the back of the head with the 12 gauge shotgun and then shot Sharmon Stock in the face. According to Reid, she and Fester immediately ran from the house and left in the stolen vehicle, which they later abandoned.

On April 23 and 24, 2006, police arrested Fester and Reid in Wisconsin for vehicle theft. Reid had left an inscribed ring in the Stocks' home that she and Fester had earlier stolen from the Wisconsin vehicle or home. The ring ultimately connected Reid and Fester to the murders.

During the investigation, law enforcement officers recovered evidence from Reid's home. On April 22, 2006, 5 days after the murders, Reid wrote in her journal: "I killed someone. He was older. I loved it. I wish I could do it all the time. If [Fester] doesn't watch it I am going to just leave one day and go do it myself." Also, at some point while Fester was in jail, Reid wrote a letter to him and left it at the home, apparently for him to retrieve after authorities released Fester on the Wisconsin charges. The letter was left in a cigarette box, which also contained a spent 12 gauge shell casing from the murders. In the letter, she wrote: "And this bullet well bunny it's the only thing left. And I loved it, but that's something we will talk about one day. But it's here also bcuz [sic] that was something I did for you, me and for you to love me as much as I love you."

On June 10, 2006, a Wisconsin detective interviewed Reid about the murders. During the interview, Reid denied that she shot Sharmon Stock but admitted that she shot Wayne Stock. On August 28, the State filed an information charging Reid with two counts of first degree murder in the Stocks' deaths. In exchange for her guilty pleas and agreement to testify against Fester, the State agreed to amend the information to two counts of second degree murder.

ASSIGNMENT OF ERROR

Reid assigns that the district court abused its discretion by imposing excessive sentences.

STANDARD OF REVIEW

[1,2] A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court.[1] An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.[2]

ANALYSIS

Reid was convicted of two counts of second degree murder, a Class 1B felony.[3] Second degree murder is punishable by a minimum of 20 years' imprisonment and a maximum of life imprisonment.[4] Thus, the district court's sentences were within the statutory limits.

Reid, however, contends that the district court abused its discretion because she did not have a history of serious criminal conduct and because Fester committed the two murders. She argues that her culpability for the murders was much less than Fester's, yet she was not given any credit for cooperating with law enforcement or for making statements that exonerated two other suspects. Finally, she argues that although the district court emphasized her letter to Fester and journal entry, she has since changed and shown great remorse over her involvement in the murders.

[3-5] When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the violence involved in the commission of the crime.[5] In imposing a sentence, the sentencing court is not limited to any mathematically applied set of factors.[6] The appropriateness

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[1] *State v. Archie*, 273 Neb. 612, 733 N.W.2d 513 (2007).

[2] *State v. Walker*, 272 Neb. 725, 724 N.W.2d 552 (2006).

[3] Neb. Rev. Stat. § 28-304 (Reissue 1995).

[4] Neb. Rev. Stat. § 28-105 (Cum. Supp. 2006).

[5] See *Archie, supra* note 1.

[6] *State v. Lassek*, 272 Neb. 523, 723 N.W.2d 320 (2006).

of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.[7]

The presentence report revealed that Reid was 17 years old at the time the Stocks were murdered and had dropped out of school in the 10th grade. She had been an honor roll student before her mother and stepfather separated when she was about 13. Over the next 2 years, she attended several new schools. She began using drugs and staying away from home for extended periods and missing a substantial amount of school. In 2004, she was placed on juvenile probation for theft. The Wisconsin Department of Social Services placed her in detention twice for parole violations. Because of the violations, authorities placed her in the juvenile intensive sanctions program. Between June 2005 and February 2006, authorities placed her in custody six times for violations of the program, including theft, criminal damage to property, and possession of drug paraphernalia. She did not comply with drug and alcohol treatment services or pay restitution. Her juvenile caseworker described her as "extremely dishonest when dealing with anybody in authority" and intent on disregarding restrictions and sanctions. After she was extradited to Nebraska, Wisconsin dismissed pending felony charges against her. A probation officer assessed she was a high risk for rearrest.

At the sentencing hearing, the court recognized that Reid was 17 when the murders were committed. It found that she was of "normal to above average intelligence" but had dropped out of school because of drug use and her involvement with "the wrong crowd." It further found that her history of drug use was a contributing factor in the crime. Finally, the court recognized that her trouble with the law began around the time that her mother and stepfather divorced. But the court concluded that her role in the Stocks' deaths was significant. The court stated that if Reid had not intervened when Wayne Stock was struggling with Fester over the gun, it was possible neither death would have occurred. Reid's journal and letter troubled the court. The court concluded:

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[7] *Id.*

> The offenses involved here were brutal, senseless crimes. By all accounts, the victims were wonderful people, respected by members of their community and church and loved very much by their family. They experienced fear and horror which is hard to imagine. They were brutally murdered in the sanctity of their own bedroom, their own home.
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> . . . It's hard, in this case, to consider anything less than life sentences.

We agree. We have reviewed Reid's statements to law enforcement regarding the murders. Contrary to Reid's arguments on appeal, the record shows that in police interviews, Reid specifically stated that she knew she had shot Wayne Stock directly above his right eye with the .410 shotgun and that she believed she had killed him before Fester shot him. Her initial statements to law enforcement about her role in shooting Wayne Stock were made to rebut the suspicion that she had shot Sharmon Stock. Many of her later statements that she might have missed while shooting at Wayne Stock were a smokescreen to minimize her role in the murders. Similarly, the statements that she claims helped to exonerate two other suspects were made after she had implicated the suspects. Apparently, the statements were motivated in part by her desire to show that she had not participated in a planned, hired killing. Finally, we believe her journal entry is the most compelling evidence of her culpability and callousness. It keeps whispering, "I killed someone. . . . I loved it. I wish I could do it all the time." As we stated in *State v. Fester*,[8] "[w]ithout provocation or justification, two innocent people were callously murdered in the solitude and sanctity of their own home. Any lesser sentence under these circumstances, even when considering the mitigating factors . . . would diminish the seriousness of this crime and promote disrespect for the law."

CONCLUSION

The district court did not err in sentencing Reid to two consecutive life sentences. The judgment of the court is affirmed.

AFFIRMED.

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[8] *State v. Fester, post* p. 786, 789-90, 743 N.W.2d 380, 383 (2007).

STATE OF NEBRASKA, APPELLEE, V.
GREGORY D. FESTER II, APPELLANT.
743 N.W.2d 380

Filed January 4, 2008. No. S-07-336.

1. **Sentences: Appeal and Error.** A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court.
2. **Sentences.** When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the amount of violence involved in the commission of the crime.
3. ____. In considering a sentence to be imposed, the sentencing court is not limited in its discretion to any mathematically applied set of factors.
4. ____. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all facts and circumstances surrounding the crime and the defendant's life.

Appeal from the District Court for Cass County: RANDALL L. REHMEIER, Judge. Affirmed.

Alan G. Stoler, of Law Office of Alan G. Stoler, P.C., L.L.O., for appellant.

Jon Bruning, Attorney General, George R. Love, and Andy Maca, Senior Certified Law Student, for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

GERRARD, J.

NATURE OF CASE

Gregory D. Fester II pled guilty to two counts of second degree murder and one count of use of a firearm in the commission of a felony in the April 17, 2006, deaths of Wayne and Sharmon Stock in Murdock, Nebraska. Fester was sentenced to a term of not less than life imprisonment nor more than life imprisonment for each count of murder in the second degree, and a term of 10 to 20 years' imprisonment for use of a firearm to commit a felony. The sentences were to be served consecutively. Fester claims the sentences were excessive. For the following reasons, we affirm the judgment of the district court.

STATEMENT OF FACTS

Fester lived with his girlfriend, Jessica Reid, in Horicon, Wisconsin. Fester and Reid left their apartment in Wisconsin on April 15, 2006, and arrived in Nebraska on April 17. Along the way, Fester and Reid participated in a crime spree that involved, among other things, stealing two cars and burning another, breaking into several homes, and stealing a 12 gauge shotgun and ammunition.

On the night of April 17, 2006, Fester and Reid arrived in Murdock, Nebraska, and, armed with a 12 gauge shotgun and a .410 shotgun, broke into the home of the Stocks with the intent to burglarize the home. The Stocks' home had been randomly selected. After entering the house, Fester heard snoring coming from upstairs. Fester and Reid went up the stairs toward the Stocks' bedroom.

It is not entirely clear what happened when Fester and Reid reached the Stocks' bedroom. But according to the uncontested recitation of the facts offered by the State at the sentencing hearing, Wayne Stock attempted to confront Fester and Reid, and Fester fired a shot that hit Wayne Stock in the knee. A struggle ensued between Fester and Wayne Stock. Apparently, while Fester and Wayne Stock were allegedly fighting over the weapon, Fester told Reid to "do something," and Reid fired her .410 shotgun in the direction of Wayne Stock. Fester then shot Wayne Stock in the back of the head with his shotgun, killing him. Then, Fester entered the bedroom and shot Sharmon Stock in the face, killing her.

Pursuant to a plea agreement, Fester was eventually charged in an amended information with two counts of murder in the second degree[1] and one count of use of a firearm in the commission of a felony.[2] Fester pled guilty to all three counts of the amended information.

The presentence investigation report revealed that Fester was 19 years of age at the time the Stocks were killed and that at the time of sentencing, he had a 2-year-old child. Fester had a lengthy history of substance abuse, including the use of alcohol,

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[1] See Neb. Rev. Stat. § 28-304 (Reissue 1995).

[2] See Neb. Rev. Stat. § 28-1205 (Reissue 1995).

marijuana, cocaine, heroin, and dextromethorphan. Fester also has an extensive history of criminal activity. Fester's prior criminal activity included, among other things, trespass to land, shoplifting, disorderly conduct, theft from a motor vehicle, criminal damage to property, and sexual assault. The presentence investigation report also revealed that during Fester's life, he had been under various degrees of psychiatric care and had taken a variety of psychotropic medications.

Following a sentencing hearing, the district court sentenced Fester to a term of not less than life imprisonment nor more than life imprisonment for each count of murder in the second degree and a term of 10 to 20 years' imprisonment for use of a firearm to commit a felony. The sentences were to be served consecutively. Fester appealed.

ASSIGNMENT OF ERROR

Fester assigns, consolidated and restated, that the district court erred in imposing excessive sentences.

STANDARD OF REVIEW

[1] A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court.[3]

ANALYSIS

Fester was convicted of two counts of second degree murder and one count of use of a firearm to commit a felony. Second degree murder is a Class IB felony,[4] punishable by a minimum of 20 years' imprisonment and a maximum of life imprisonment.[5] Use of a deadly weapon which is a firearm to commit a felony is a Class II felony[6] and is punishable by a minimum of 1 year's imprisonment and a maximum of 50 years' imprisonment.[7] The sentences imposed on Fester were within the statutory limits.

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[3] *State v. Archie*, 273 Neb. 612, 733 N.W.2d 513 (2007).

[4] § 28-304.

[5] Neb. Rev. Stat. § 28-105 (Cum. Supp. 2006).

[6] § 28-1205.

[7] § 28-105.

Fester nonetheless argues that his sentences were excessive. Fester contends that the district court failed to properly consider, as a mitigating factor, his acceptance of responsibility for the crime and his admission of guilt. Fester also claims that the court erred in failing to adequately weigh certain mitigating circumstances including his age, his history of mental illness, his use of drugs before the commission of the crime, and the fact that he has a 2-year-old child.

[2-4] When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the amount of violence involved in the commission of the crime.[8] We have further held that, in considering a sentence to be imposed, the sentencing court is not limited in its discretion to any mathematically applied set of factors. Obviously, depending on the circumstances of a particular case, not all factors are placed on a scale and weighed in equal proportion. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all facts and circumstances surrounding the crime and the defendant's life.[9]

The presentence investigation report reveals that Fester has an extensive criminal record, a significant history of drug use and distribution, and a history of violence. The record also plainly establishes that the killing of the Stocks was depraved, violent, and senseless. In discussing the killings, Fester admitted to the presentence investigative probation officer that he and Reid "'really didn't need any money, we were just there for the thrill I guess.'"

At sentencing, the district court considered both the mitigating and aggravating factors and explained that Fester's "possibility of rehabilitation is remote and is far outweighed in this case by the necessity and need for the protection of society." We agree. Without provocation or justification, two innocent

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[8] *State v. Archie, supra* note 3.

[9] See *State v. Aldaco*, 271 Neb. 160, 710 N.W.2d 101 (2006).

people were callously murdered in the solitude and sanctity of their own home. Any lesser sentence under these circumstances, even when considering the mitigating factors urged by Fester, would diminish the seriousness of this crime and promote disrespect for the law.

CONCLUSION

We have reviewed the record and considered Fester's arguments. Based on our review of the record, and the foregoing reasoning, we conclude that the district court did not abuse its discretion in sentencing Fester. The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V. TERRENCE D. MOORE, APPELLEE.

743 N.W.2d 375

Filed January 4, 2008. No. S-07-370.

1. **Sentences: Appeal and Error.** Whether an appellate court is reviewing a sentence for its leniency or its excessiveness, a sentence imposed by a district court that is within the statutorily prescribed limits will not be disturbed on appeal unless there appears to be an abuse of the trial court's discretion.
2. **Judges: Words and Phrases.** A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition.
3. **Sentences: Appeal and Error.** When the State challenges a sentence as excessively lenient, the appellate court should consider (1) the nature and circumstances of the offense; (2) the history and characteristics of the defendant; (3) the need for the sentence imposed (a) to afford adequate deterrence to criminal conduct, (b) to protect the public from further crimes of the defendant, (c) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense, and (d) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; and (4) any other matters appearing in the record which the appellate court deems pertinent.
4. **Sentences.** A sentencing court is not limited in its discretion to any mathematically applied set of factors. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the

defendant's life. But there also must be some reasonable factual basis for imposing a particular sentence.

Appeal from the District Court for Douglas County: JOSEPH S. TROIA, Judge. Sentences vacated, and cause remanded with directions.

Donald W. Kleine, Douglas County Attorney, and Jennifer Meckna for appellant.

Thomas C. Riley, Douglas County Public Defender, and Scott C. Sladek for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MILLER-LERMAN, J.

NATURE OF CASE

Terrence D. Moore pled guilty to two counts of second degree murder and two counts of use of a firearm to commit a felony. The district court for Douglas County sentenced Moore to imprisonment for 30 to 45 years on each count of second degree murder and for 10 to 10 years on each firearm count. The two sentences for second degree murder were ordered to be served concurrently to one another, and the two sentences for the firearm counts were ordered to be served consecutively to one another and to the sentences for second degree murder. The State appeals Moore's sentences as being excessively lenient. We conclude that Moore's sentences were excessively lenient, and we therefore vacate Moore's sentences and remand the cause with directions for resentencing by a different judge.

STATEMENT OF FACTS

In the early morning hours of February 25, 2005, Moore went to the apartment of Terry Jasper and Diane Caveye. Moore was angry over events that had occurred the previous day. According to Moore, Jasper had "punked" him by failing to pay approximately $30 that he owed Moore for drugs. When Moore went to Jasper and Caveye's apartment, Moore was armed with a 9mm-handgun. Jasper's nephew, Jackie Payne, was present at the apartment when Moore arrived.

An argument ensued between Moore and Jasper. At one point, Moore and Payne went into the bathroom to talk. Moore told Payne he was angry with Jasper because Jasper owed Moore money and had left Moore waiting at an arranged meeting place the prior day. Moore showed Payne his gun and told Payne he felt like "unloading" the gun. Payne thought that Moore had calmed down after they talked in the bathroom; however, shortly after exiting the bathroom, Moore shot Jasper three times. Jasper was sitting in a chair when Moore fired the first two shots, and Moore fired the third shot into Jasper's back after he fell to the ground. Caveye was lying on a couch with a blanket over herself. After shooting Jasper, Moore shot Caveye three times. Payne was present and witnessed the shootings. Jasper and Caveye died from the gunshot wounds.

Moore fled the scene after shooting Jasper and Caveye. Moore was arrested on March 9, 2005, and confessed to the shootings. He said that he was angry with Jasper because Jasper had "punked" him, that he shot Jasper because he was scared, and that after firing the first two shots at Jasper, he fired the third shot because he was afraid Jasper would identify Moore as the perpetrator. Moore said that he shot Caveye because he was scared that if he did not she would tell someone that he had shot Jasper. Moore was originally charged with two counts of first degree murder and two counts of use of a firearm to commit a felony. Pursuant to a plea agreement, Moore pled guilty to two counts of second degree murder and two counts of use of a firearm to commit a felony.

Moore was originally sentenced on May 23, 2006. Moore appealed to this court on the basis that the written order of commitment contained sentencing terms inconsistent with the sentence imposed by the court's oral pronouncement. Without reaching Moore's assigned error, this court, in a memorandum opinion dated January 4, 2007, vacated the sentences and remanded the cause for resentencing on the basis that the district court had erred as a matter of law when it ordered that the sentence for at least one of the firearm counts be served concurrently to one of the sentences for second degree murder. Under Neb. Rev. Stat. § 28-1205(3) (Reissue 1995), a sentence

for use of a weapon must be served consecutive to any other sentence imposed.

Upon remand, Moore was resentenced, and the new sentence gives rise to this appeal. On March 20, 2007, the district court sentenced Moore to imprisonment for 30 to 45 years on each count of second degree murder and for 10 to 10 years on each firearm count. The two sentences for second degree murder were ordered to be served concurrently to one another, and the two sentences for the firearm counts were ordered to be served consecutively to one another and to each of the sentences for second degree murder.

The State requested and received the Attorney General's approval to appeal the sentences as excessively lenient pursuant to Neb. Rev. Stat. §§ 29-2320 and 29-2321 (Cum. Supp. 2006).

ASSIGNMENT OF ERROR

The State claims that the district court abused its discretion by imposing excessively lenient sentences.

STANDARDS OF REVIEW

[1,2] Whether an appellate court is reviewing a sentence for its leniency or its excessiveness, a sentence imposed by a district court that is within the statutorily prescribed limits will not be disturbed on appeal unless there appears to be an abuse of the trial court's discretion. *State v. Rice*, 269 Neb. 717, 695 N.W.2d 418 (2005). A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition. *Id.*

ANALYSIS

Pursuant to a plea agreement, Moore was convicted of two counts of second degree murder and two counts of use of a firearm to commit a felony. Second degree murder is a Class IB felony, punishable by imprisonment for 20 years to life. Neb. Rev. Stat. §§ 28-304(2) (Reissue 1995) and 28-105 (Cum. Supp. 2006). Use of a firearm to commit a felony is a Class II felony, punishable by imprisonment for 1 to 50 years. §§ 28-1205(2)(b) and 28-105. Section 28-1205(3) provides that the sentence imposed for use of a firearm to commit a felony

"shall be consecutive to any other sentence imposed." Although Moore's sentences were within statutory limits, we determine that the trial court abused its discretion by imposing excessively lenient sentences.

[3,4] When the State challenges a sentence as excessively lenient, the appellate court should consider:

> (1) The nature and circumstances of the offense;
>
> (2) The history and characteristics of the defendant;
>
> (3) The need for the sentence imposed:
>
> (a) To afford adequate deterrence to criminal conduct;
>
> (b) To protect the public from further crimes of the defendant;
>
> (c) To reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; and
>
> (d) To provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; and
>
> (4) Any other matters appearing in the record which the appellate court deems pertinent.

Neb. Rev. Stat. § 29-2322 (Reissue 1995). Accord *State v. Rice, supra*. A sentencing court is not limited in its discretion to any mathematically applied set of factors. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life. *State v. Rice, supra*. But there also must be some reasonable factual basis for imposing a particular sentence. *Id*.

Moore killed one person because he was angry over an unpaid drug debt of approximately $30 and killed a second person in order to prevent her from being a witness to the first killing. We note that Moore's guilty plea resulted from an agreement which reduced the homicide charges to second degree murder from the original charges of first degree murder, a Class IA felony punishable by imprisonment for life without parole, or a Class I felony punishable by death. Neb. Rev. Stat. § 28-303 (Cum. Supp. 2006) and § 28-105. Moore admitted that he killed both Jasper and Caveye in the same incident and that he shot

Caveye in order to prevent her from telling anyone that he had shot Jasper. Were this a first degree murder case, we note that under Neb. Rev. Stat. § 29-2523 (Cum. Supp. 2006), among the aggravating circumstances that would make a defendant eligible for the death penalty are that "[a]t the time the murder was committed, the offender also committed another murder" and that the "murder was committed in an effort to conceal the commission of a crime, or to conceal the identity of the perpetrator of such crime." Because two circumstances were present in this case which are comparable to first degree aggravators, it is clear that Moore's crimes were of the type that the Legislature has deemed to be the most serious in this state. We agree.

Moore points to his lack of an extensive history of criminal violence, his clear expression of remorse, and his lack of chemical or alcohol dependency issues as factors indicating that his sentences were not excessively lenient. Although Moore's criminal history is arguably not "extensive," it is significant and includes a drug conviction and an assault conviction and indicates an increasing involvement in criminal activity.

We note that Moore was shown a degree of leniency by the State when it entered into a plea agreement under which the homicide charges were reduced from first to second degree murder and that Moore was thereby spared the possibility of sentences of either life without parole or death. The crimes in this case were of the type deemed to be the most serious in this state, and the mitigating factors noted by Moore are not sufficient to justify the lenience granted by the trial court in imposing sentences that were at the lower end of the range of possible sentences and in ordering the sentences for the two murder charges be served concurrently to one another. We conclude that considering the facts and the nature of the offenses committed by Moore, the sentences given in this case do not adequately reflect the seriousness of the offenses, do not promote respect for the law, and do not provide just punishment.

CONCLUSION

Considering the very serious nature of the offenses committed by Moore, we conclude that the district court abused its discretion by imposing excessively lenient sentences. In this

circumstance, Neb. Rev. Stat. § 29-2323 (Reissue 1995) permits an appellate court to set aside the sentence and either (1) remand the cause for imposition of a greater sentence, (2) remand the cause for further sentencing proceedings, or (3) impose a greater sentence. We deem the first option to be appropriate in this case and, therefore, vacate the sentences and remand the cause to the district court with instructions to impose greater sentences. The sentences should be imposed by a different district court judge than the original sentencing judge. See *State v. Fields*, 268 Neb. 850, 688 N.W.2d 878 (2004).

SENTENCES VACATED, AND CAUSE REMANDED WITH DIRECTIONS.

LARRY COFFEY, APPELLANT AND CROSS-APPELLEE, V. COUNTY OF OTOE, NEBRASKA, AND THE BOARD OF ADJUSTMENT OF OTOE COUNTY, NEBRASKA, APPELLEES AND CROSS-APPELLANTS, AND KENT AND SUE KREIFELS, INTERVENORS-APPELLEES AND CROSS-APPELLANTS.

743 N.W.2d 632

Filed January 11, 2008. No. S-06-921.

1. **Constitutional Law: Statutes: Ordinances.** The constitutionality of a statute or an ordinance is a question of law.
2. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusions reached by the trial court.
3. **Zoning: Ordinances: Presumptions: Proof.** The validity of a zoning ordinance will be presumed in the absence of clear and satisfactory evidence to the contrary.
4. **Constitutional Law: Proof.** The burden of demonstrating the constitutional defect rests with the challenger.
5. **Municipal Corporations: Ordinances: Zoning: Proof.** To successfully challenge the validity of a zoning ordinance, the party challenging must prove that the conditions imposed by the city in adopting the zoning ordinance were unreasonable, discriminatory, or arbitrary, and that the regulation bears no relationship to the purpose sought to be accomplished by the ordinance.
6. **Constitutional Law: Property: Statutes: Ordinances: Waiver.** If the action of a property owner has the effect of legislation in that the action creates the restriction or prohibition, then the ordinance or statute constitutes an unlawful delegation of legislative authority. But, if the consent is used for no other purpose than to waive or modify a restriction which the governing body has lawfully created and

has provided for such a waiver or modification by those most affected, then the consent is regarded as being within constitutional limitations.

7. **Due Process: Waiver.** In order for a legislative delegation to private citizens to survive a due process challenge, two criteria must be satisfied. First, the underlying exercise of authority must be a reasonable regulation within the power of the government. Second, the governing body's restriction must be in the form of a general prohibition, and the delegation must be in the form of permitting private citizens to waive the protection of that prohibition.

Appeal from the District Court for Otoe County: RANDALL L. REHMEIER, Judge. Reversed and remanded with directions.

William G. Blake, of Pierson, Fitchett, Hunzeker, Blake & Katt, for appellant.

Jeffrey J. Funke, Otoe County Attorney, and David J. Partsch, for appellees County of Otoe and Board of Adjustment of Otoe County.

Joseph F. Bachmann and Shawn P. Dontigney, of Perry, Guthery, Haase & Gessford, P.C., L.L.O., for appellees Kent and Sue Kreifels.

HEAVICAN, C.J., WRIGHT, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

GERRARD, J.

NATURE OF CASE

Otoe County enacted a zoning regulation that prohibits, among other things, the construction of single-family dwellings within a one-half-mile radius of certain animal feeding and waste handling facilities, unless the owner of the single-family dwelling grants an impact easement to the owner of the facility and the owner of the facility agrees to the easement. The primary issue presented in this appeal is whether the regulation, requiring that the granting of the easement be "mutual," constitutes an unauthorized delegation of legislative authority to private citizens.

STATEMENT OF FACTS

Kent Kreifels began operating a hog confinement facility on his property in Otoe County, Nebraska, in 1990. As part of

his hog confinement operation, Kreifels disposes of the waste produced by the pigs by spreading the waste on various parts of his property. On the occasions when the waste is spread upon Kreifels' property, the dust, noise, and odor can be bothersome for neighboring property owners.

Beginning in March 2000, Otoe County held several public meetings to discuss and consider regulations for a comprehensive zoning plan for the county. In April 2001, before the zoning regulations had been adopted, Larry Coffey purchased approximately 195 acres of land adjacent to the land owned by Kreifels in Otoe County. At the time Coffey purchased the land, it was zoned as agricultural. It was Coffey's intent to divide the land into smaller parcels and sell the lots for residential development. The comprehensive zoning plan and regulations were adopted by the county on April 9, 2002, and were later amended on September 23, 2003. For purposes of this case, the amendments made to the regulations in 2003 are not substantive and thus, we will use this current version.

Under the new zoning regulations, both Kreifels' and Coffey's properties are located in the "General Agricultural District." The following regulations, designed to promote and facilitate agriculture, are relevant to this case:

> **501.01 INTENT:** The intent of [the general agricultural] district is to promote and facilitate agricultural crop production, livestock production, which is in balance with the natural environment, and other and new forms of agricultural production which are compatible with existing agricultural uses and the environmental limitations of the County. The intent is also to encourage soil and water conservation, to prevent contamination of the natural environment within the County and to preserve and protect land best suited for agricultural uses by preventing or regulating the introduction, encroachment and location of commercial uses, industrial uses and other non-agricultural uses, including non-farm residential uses, which would be or could become incompatible with the agricultural character and occasional generation of dust, odors, and other similar events produced agricultural uses, or which could result in contamination of the air, soils and

water, or which could negatively impact the use, value and enjoyment of property, and the culture and way of life in Otoe County.

. . . .

501.03 PERMITTED PRINCIPAL USES AND STRUCTURES: The following uses and structures shall be permitted uses, but shall require the issuance of a zoning / building permit and / or certificate of zoning compliance:

. . . .

9. Single-Family dwellings . . . provided such dwellings comply with all of the following conditions.

A. Such dwellings, if not on the same lot with and not of the same ownership as any existing confined animal feeding use . . . shall be separated from such use by the minimum distance specified in Table 501.05, MINIMUM SEPARATION DISTANCES FOR CONFINED AND INTENSIVE ANIMAL FEEDING USES for the size of the animal feeding use and the type of waste handling facility in existence, provided that if one or more impact easement(s), as defined in Section 303.53 of this Resolution, is/are granted by the owner of the dwelling unit to the owner of a confined or intensive animal feeding use or waste handling facility, any dwelling unit(s) associated with the land on which any such easement has been granted shall not be included in the minimum distance measurements herein specified.

Pursuant to table 501.05, the required minimum distance in this case between Kreifels' operation and a neighboring residence would be one-half mile. The record establishes that of the 195 acres of land owned by Coffey, approximately 192 acres fall within one-half mile of Kreifels' hog confinement operation.

Section 303.53 defines an "Impact Easement" as

> [a]n easement or deed restriction, recorded in the office of the Otoe County Registrar of Deeds, which runs with the land, which is granted to the owner of an industrial use, a confined or intensive animal feeding use, a waste handling facility use or other use for the period of time that such use shall exist, by the owners of adjoining or neighboring real property in which it is *mutually agreed* that the

> grantor shall hold the grantee harmless from odor, smoke, dust, or other legal impacts associated with such use on the grantor's property when such use is operated in accordance with the terms of such easement or deed restriction. [(Emphasis supplied.)]

After the zoning regulations had been adopted, Coffey had his property surveyed. On August 29, 2002, Coffey filed with the Otoe County register of deeds a subdivision plat dividing his property into five tracts. On March 4, 2003, the zoning administrator for Otoe County sent Coffey's real estate agent a copy of the Otoe County zoning regulations and informed the agent that an impact easement would be needed from Kreifels before a building permit could be issued for Coffey's lots.

In October 2004, Coffey entered into an agreement to sell one of his parcels of land to Ray and Connie O'Connor. In the agreement, the O'Connors acknowledged the presence of Kreifels' hog confinement facility and the need to obtain an impact easement. The agreement also provided that the sale of the land was subject to the acquisition of a building permit. On December 2, Coffey, through his attorney, prepared an impact easement and sent it to Kreifels. The impact easement was attached to a letter requesting that Kreifels sign the impact easement and return it to Coffey's attorney within 7 days. Kreifels did not sign or return the impact easement.

Without having acquired an impact easement, the O'Connors requested a building permit. On December 30, 2004, the zoning administrator sent a letter to the O'Connors, explaining that pursuant to the zoning regulations, the zoning administrator could not issue a building permit within one-half mile of where Kreifels deposits liquid manure products unless the O'Connors obtained an impact easement signed by Kreifels.

Coffey then filed an application for a conditional use permit with the Otoe County Planning Commission to allow residential construction on his property. Following a hearing, the Otoe County Planning Commission denied Coffey's request on February 17, 2005. Coffey then applied to the Otoe County Board of Adjustment for a variance from the application of the zoning regulations. On April 21, the Otoe County Board of

Adjustment denied Coffey's request for a variance. The present action was then filed in the district court for Otoe County.

In his complaint, Coffey appealed the Otoe County Board of Adjustment's denial of his request for a variance. Coffey also sought declaratory and injunctive relief, claiming, among other things, that § 501.03, subsection (9)(A), and § 303.52 (now § 303.53 with the 2003 amendments) of the zoning regulations are unlawful because these sections constitute "an unlawful delegation of the county's governmental regulatory power to private individuals." Kreifels and his wife filed a motion to intervene, which was granted.

There was testimony presented at trial that Kreifels' hog confinement operation attracts a large number of flies and also generates odor, noise, and dust. Kreifels explained that, among other things, he is concerned that if he signed the easement and continued to operate his hog confinement facility, he would continually be involved in litigation regarding the validity of the easement and in potential future litigation relating to the health of the property owners within a one-half-mile radius.

The evidence presented at trial also indicated that although Kreifels refused to sign Coffey's impact easement, Kreifels had signed two impact easements in the past for other property owners whose land was adjacent to his. Kreifels testified, however, that he signed the prior impact easements because, at the time, it was his understanding that he was required to do so.

Following a bench trial, the district court affirmed the denial of Coffey's request for a variance, concluding that Coffey had failed to show that the decision of the Board of Adjustment was not supported by the evidence, or was arbitrary and unreasonable, or clearly wrong. The court also determined that the portion of § 501.03(9)(A) of the zoning regulations which provided for a mutual impact easement exception to the one-half-mile building prohibition was an unlawful delegation of the county's legislative authority and a violation of Coffey's rights to due process and equal protection of the law.

However, the court found that while the "impact easement" exception in § 501.03(9)(A) was invalid, the remainder of § 501.03(9)(A), as well as the other provisions in the zoning regulations, are still enforceable. The court explained

that "[s]triking the 'impact easement' exception portion of § 501.03(9)(A) results in the first part of § 501.03(9)(A) remaining intact, meaning that a building [sic] is strictly prohibited from building residential dwellings within the [one-half-]mile halo, the minimum distance requirement set in Table 501.05 of the Otoe County [z]oning [r]egulations."

Coffey filed a motion for new trial, which was overruled. Coffey appeals, and Otoe County and the Otoe County Board of Adjustment (hereinafter collectively Otoe County) and the Kreifelses cross-appeal.

ASSIGNMENT OF ERROR

Coffey assigns, consolidated and restated, that the district court erred in severing only the impact easement language from § 501.03(9)(A) and enforcing the remainder of that section. Coffey asserts that the court should have either (1) found § 501.03(9)(A) void in its entirety or (2) left § 501.03(9)(A) intact and removed the language from § 303.53 requiring that the impact easement be mutually agreed to.

On cross-appeal, the Kreifelses and Otoe County assign, restated, that the district court erred in determining that the mutual impact easement language in the zoning regulations constituted an unconstitutional delegation of legislative authority.

STANDARD OF REVIEW

[1,2] The constitutionality of a statute or an ordinance is a question of law.[1] When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusions reached by the trial court.[2]

ANALYSIS

Constitutionality of § 501.03(9)(A)

We first address the argument raised by the Kreifelses and Otoe County in their cross-appeal, as our resolution of this issue is dispositive of this appeal. On cross-appeal, the Kreifelses and

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[1] *State v. Champoux*, 252 Neb. 769, 566 N.W.2d 763 (1997).

[2] *Coral Prod. Corp. v. Central Resources*, 273 Neb. 379, 730 N.W.2d 357 (2007).

Otoe County contend that the district court erred in finding that the mutual impact easement language in § 501.03(9)(A) of the zoning regulations was an improper delegation of legislative authority.

[3-5] The validity of a zoning ordinance will be presumed in the absence of clear and satisfactory evidence to the contrary.[3] The burden of demonstrating the constitutional defect rests with the challenger.[4] To successfully challenge the validity of a zoning ordinance, the party challenging must prove that the conditions imposed by the city in adopting the zoning ordinance were unreasonable, discriminatory, or arbitrary, and that the regulation bears no relationship to the purpose sought to be accomplished by the ordinance.[5]

Coffey contends that the district court correctly determined that the mutual impact easement requirement in the zoning regulations constituted an unconstitutional delegation of legislative authority. In general, Coffey claims that the provision in question violates due process because it gives owners of animal feeding and waste handling facilities the ability to arbitrarily and capriciously refuse the granting of an impact easement and, as a result, restrict Coffey's ability to use his land.

The starting points for analysis of this issue are the U.S. Supreme Court's opinions in *Eubank v. Richmond*[6] and *Cusack Co. v. City of Chicago*.[7] In *Eubank*, an ordinance was enacted that required the city's building committee to establish setback lines for a given piece of property whenever requested to do so by two-thirds of the adjacent property owners. The Court ruled that this ordinance was void. The Court stated that under the ordinance, "[o]ne set of owners determine[s] not only the extent of use but the kind of use which another set

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[3] *Premium Farms v. County of Holt*, 263 Neb. 415, 640 N.W.2d 633 (2002); *Gas 'N Shop v. City of Kearney*, 248 Neb. 747, 539 N.W.2d 423 (1995).

[4] *Maxon v. City of Grand Island*, 273 Neb. 647, 731 N.W.2d 882 (2007).

[5] *Gas 'N Shop v. City of Kearney, supra* note 3.

[6] *Eubank v. Richmond*, 226 U.S. 137, 33 S. Ct. 76, 57 L. Ed. 156 (1912).

[7] *Cusack Co. v. City of Chicago*, 242 U.S. 526, 37 S. Ct. 190, 61 L. Ed. 472 (1917).

of owners may make of their property."[8] The Court explained that owners who have the authority to establish the line could do so based on their own interest, caprice, or taste, and "[i]t is hard to understand how public comfort or convenience, much less public health, can be promoted by a line which may be so variously disposed."[9]

Five years after *Eubank*, in *Cusack Co.*,[10] the Court upheld a city ordinance that prohibited the construction of billboards in residential areas without the consent of the owners of a majority of the frontage property on the block in which the billboard was to be erected. The corporation seeking to construct the billboard argued that the ordinance was "a delegation of legislative power to the owners of a majority of the frontage of the property in the block 'to subject the use to be made of their property by the minority owners of property in such block to the whims and caprices of their neighbors.'"[11]

The Court rejected this argument and distinguished *Cusack Co*. from its previous holding in *Eubank*. The Court explained that

> [a] sufficient distinction between the ordinance [in *Eubank*] and the one at bar is plain. The former left the establishment of the building line untouched until the lot owners should act and then made the street committee the mere automatic register of that action and gave to it the effect of law. The ordinance in the case at bar absolutely prohibits the erection of any billboards in the blocks designated, but permits this prohibition to be modified with the consent of the persons who are to be most affected by such modification. The one ordinance permits two-thirds of the lot owners to impose restrictions upon the other property in the block, while the other permits one-half of the lot owners to remove a restriction from the other property owners. This is not a delegation of legislative power, but is, as we

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[8] *Eubank v. Richmond, supra* note 6, 226 U.S. at 143.

[9] *Id.*, 226 U.S. at 144. See, also, *Seattle Trust Co. v. Roberge*, 278 U.S. 116, 49 S. Ct. 50, 73 L. Ed. 210 (1928).

[10] *Cusack Co. v. City of Chicago, supra* note 7.

[11] *Id.*, 242 U.S. at 528.

> have seen, a familiar provision affecting the enforcement of laws and ordinances.[12]

[6] From these cases, courts have derived a well-recognized, general rule for determining whether a consent provision violates due process as an unlawful delegation of legislative authority. If the action of a property owner has the effect of legislation in that the action *creates* the restriction or prohibition, then the ordinance or statute constitutes an unlawful delegation of legislative authority. But, if the consent is used for no other purpose than to *waive or modify* a restriction which the governing body has lawfully created and has provided for such a waiver or modification by those most affected, then the consent is regarded as being within constitutional limitations.[13]

[7] As the Court of Appeals for the District of Columbia explained, "[t]he Supreme Court has long held that a municipality may prohibit a disfavored use of property but permit private citizens to waive that prohibition and consent to the use."[14]

> In order for a legislative delegation to private citizens to survive a due process challenge, the Court instructs that two criteria must be satisfied. First, the underlying exercise of authority must be a reasonable regulation within the power of the government. . . . Second, the legislature's restriction must be in the form of a general prohibition, and the delegation must be in the form of permitting private citizens to waive the protection of that prohibition.[15]

We recognize and agree with that articulation of the applicable due process principles. Thus, the zoning regulation at issue in this case will survive Coffey's constitutional challenge if the regulation enacts a general prohibition that would be an otherwise reasonable and valid regulation and then delegates to

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[12] *Id.*, 242 U.S. at 531.

[13] *O'Brien v. City of St. Paul*, 285 Minn. 378, 173 N.W.2d 462 (1969). See, e.g., *Cross v. Bilett*, 122 Colo. 278, 221 P.2d 923 (1950); *Arno v. Alcoholic Beverages Control Commission*, 377 Mass. 83, 384 N.E.2d 1223 (1979); *Robwood Adv. Assoc. v. Nashua*, 102 N.H. 215, 153 A.2d 787 (1959); *Davis v. Blount County Beer Bd.*, 621 S.W.2d 149 (Tenn. 1981).

[14] *Silverman v. Barry*, 845 F.2d 1072, 1086 (D.C. Cir. 1988).

[15] *Id.* (citation omitted).

private citizens the mere opportunity to waive that prohibition. Here, we find that § 501.03(9)(A) meets this standard and is a constitutionally permissible legislative delegation.

The Nebraska Legislature has given Otoe County the power to pass zoning ordinances "for the purpose of promoting the health, safety, morals, convenience, order, prosperity, and welfare of the present and future inhabitants of Nebraska."[16] Otoe County, in accordance with this authority, adopted a comprehensive zoning plan and zoning regulations. As the Otoe County zoning regulation states, the intent of the general agricultural district is "to preserve and protect land best suited for agricultural uses by *preventing or regulating* the introduction, encroachment and location of . . . non-agricultural uses, including non-farm residential uses."[17] Otoe County accomplished this intent by, among other things, enacting § 501.03(9)(A) which, in general, prohibits the construction of single-family dwellings within certain distances of animal feeding and waste handling facilities, unless a mutual impact easement is obtained.

Had Otoe County desired to do so, it could have adopted a regulation, without the option of a mutual impact easement, that absolutely prohibited the construction of single-family dwellings within the setback distance set forth in the regulations. Stated differently, absolutely prohibiting the construction of single-family dwellings within the distances specified in the regulations would have been a reasonable setback and a valid exercise of Otoe County's police power.[18]

Coffey argues, however, that Otoe County did not intend to absolutely prohibit the construction of single-family dwellings within one-half mile of existing animal feeding or waste handling facilities. Rather, Coffey suggests that by creating the setback provision, Otoe County simply intended to regulate such construction. In support of this argument, Coffey notes

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[16] Neb. Rev. Stat. § 23-114.03 (Cum. Supp. 2006).

[17] § 501.01 (emphasis supplied).

[18] See Neb. Rev. Stat. § 23-114 et seq. (Reissue 1997 & Cum. Supp. 2006). See, also, *Schaffer v. City of Omaha*, 197 Neb. 328, 248 N.W.2d 764 (1977); *City of Beatrice v. Williams*, 172 Neb. 889, 112 N.W.2d 16 (1961).

that single-family dwellings are listed as a permitted principal use in the general agricultural district.

We are not persuaded by Coffey's argument. Although the zoning regulations contain a broad statement that single-family dwellings are a permitted principal use in the general agricultural district, § 501.03(9)(A) expressly limits this broad statement. Section 501.03(9)(A) provides, in relevant part, that

> [single-family] dwellings, if not on the same lot with and not of the same ownership as any existing confined animal feeding use, . . . any existing intensive animal feeding use, . . . or any waste handling facility, . . . *shall be separated from such use* by the minimum distance specified in Table 501.05 [(one-half mile in this case)].

It is clear from this language that single-family dwellings are not allowed within specified distances of animal feeding and waste handling facilities. And this prohibition is entirely consistent with Otoe County's stated intent for the creation of the general agricultural district, "to preserve and protect land best suited for agricultural uses."[19]

Notwithstanding the absolute prohibition set forth in the beginning of § 501.03(9)(A), the second portion of § 501.03(9)(A) provides that this absolute prohibition can be overcome, but only if both parties are able to agree to a mutual impact easement. However, if no agreement is reached, the prohibition remains in effect.

The regulations at issue simply afford the owners of animal feeding and waste handling facilities a limited opportunity to waive a restriction created by Otoe County, just as the ordinance in *Cusack Co.*[20] provided one-half of the property owners with the power to waive the billboard restriction. And since the property owners in *Cusack Co.* were not empowered to make the law and force it upon others, because the billboard prohibition remained in effect if they chose not to exercise their waiver power, neither are owners of animal feeding and waste handling facilities so empowered by the fact that Otoe County's restriction remains in effect if the owners choose not to exercise the

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[19] § 501.01

[20] *Cusack Co. v. City of Chicago, supra* note 7.

limited waiver power. In light of the foregoing discussion, we conclude that the mutual impact easement language in Otoe County's zoning regulations is not an unconstitutional delegation of legislative authority, and the district court erred in concluding otherwise.

In arguing to the contrary, Coffey relies on a 1907 opinion by this court, *State v. Withnell*.[21] In *Withnell*, a gas company applied for a permit to construct a gas storage facility. The application complied with all of the regulations except for a requirement that the gas company obtain the written consent of all the property owners within 1,000 feet of the site of the proposed facility. The application was denied because the gas company failed to acquire the necessary consent. The gas company challenged the validity of the consent requirement, and this court agreed, concluding that the ordinance, "in so far as it requires the written consent of the property owners, is void."[22]

Withnell, however, is distinguishable from the present case. In *Withnell*, this court concluded that the ordinance was not intended to be prohibitory. It was an unreasonable exercise of the police power because it involved delegating a balance between an "indispensable" public utility and the risk to public safety it represented, which we held to be undelegable.[23] Such is not the case here. And in any event, to the extent our analysis in *Withnell* is inconsistent with the later decisions of the U.S. Supreme Court, the Supreme Court's exposition of the Due Process Clause clearly controls.

Our conclusion that the regulation at issue is constitutional is dispositive of this appeal, and therefore, we need not address Coffey's assignments of error.

CONCLUSION

We conclude that the district court erred in finding that the mutual impact easement language in Otoe County's zoning regulations constituted an unlawful delegation of legislative

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[21] *State v. Withnell*, 78 Neb. 33, 110 N.W. 680 (1907).

[22] *Id.* at 39, 110 N.W. at 682.

[23] *Id.* at 35, 110 N.W. at 681.

authority. Accordingly, we reverse the judgment and remand the cause to the district court with directions to affirm the ruling of the Otoe County Board of Adjustment.

REVERSED AND REMANDED WITH DIRECTIONS.

CONNOLLY, J., not participating.

AARON SILA, APPELLEE, V.
KIRK SAUNDERS, APPELLANT.
743 N.W.2d 641

Filed January 11, 2008. No. S-06-1160.

1. **Boundaries: Time.** Under the doctrine of mutual recognition and acquiescence, while a boundary may be fixed in accordance with a survey, when a different boundary is shown to have existed between the parties for the 10-year statutory period, it is that boundary line which is determinative and not that of the original survey.
2. **Boundaries.** The fact that the true boundary is "knowable" because the deed contains a metes and bounds description that a registered surveyor could have properly marked on the land—but did not—does not preclude the property owners from acquiescing in a boundary that they believe corresponds with the deed's description.
3. ____. That a boundary line is, in fact, an approximation of the real boundary, does not preclude a finding of mutual recognition and acquiescence, so long as the acquiescing parties recognized this approximation as their actual boundary.
4. ____. The filial relationship rule has no bearing on a mutual recognition and acquiescence analysis.
5. ____. In order for mutual recognition and acquiescence to operate, there must be an assent, by words, conduct, or silence, in a line as the boundary.

Appeal from the District Court for Dakota County: WILLIAM BINKARD, Judge. Reversed and remanded with directions.

Lance D. Ehmcke, Jeremy J. Cross, and Joel D. Vos, of Heidman, Redmond, Fredregill, Patterson, Plaza, Dykstra & Prahl, L.L.P., for appellant.

Paul W. Deck, of Deck & Deck, L.L.P., for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

McCORMACK, J.

NATURE OF CASE

Aaron Sila brought this action under Neb. Rev. Stat. § 34-301 (Reissue 2004) to establish the east boundary line of his property adjoining the property of the defendant, Kirk Saunders. Sila sought to establish the boundary line in accordance with the original government survey. Kirk asserted that under theories of mutual acquiescence and adverse possession, the historically recognized boundary should instead be acknowledged.

BACKGROUND

The properties in issue were once part of a single 78-acre farm owned by Kirk's grandfather, Fred Saunders. Fred owned and farmed the land from the early 1940's until his death in 1961. After Fred's death, the land was divided into three parcels and given to his three sons: Vern Saunders, George Saunders, and Kirk's father, Eugene Saunders. George was given the smaller parcel of 18 acres immediately to the east of a county road. Vern and Eugene were each given adjacent 30-acre parcels to the east of George's 18 acres. A year later, Vern died, and his 30 acres were acquired by Eugene. Kirk eventually inherited a 20-acre segment of Eugene's 60 acres. That segment abuts the disputed 18-acre parcel originally given to George, and most recently acquired by Sila. It is the boundary between these two properties that is currently in dispute.

In 1962, George and Eugene set about establishing the shared boundary of their properties. Eugene's son and Kirk's brother, Elliotte Saunders, was a teenager at the time. He assisted in measuring the boundary and helped Eugene farm the land east of the 18-acre parcel until Eugene's death in 1989. Elliotte testified that their purpose in measuring and marking the boundary was "[t]o split the farm up to get a boundary line so [George] knew what he owned and what my dad owned."

George's 18 acres were legally described as: "The West Thirty-Six (36) rods of the North Half of the Northwest Quarter (N 1/2 NW 1/4) of Section Thirteen (13), Township Twenty-Nine (29) North, Range Seven (7) East of the Sixth Principal Meridian, Dakota County, Nebraska." George and Eugene decided not to hire a professional surveyor to mark the

boundary. There was a barbed wire fence along the north and south borders of the properties, and George and Eugene mistakenly believed that the middle of the county road represented a section line marking the west boundary of George's 18 acres. Thus, George and Eugene, with Elliotte's assistance, took a 100-foot tape measure and some flags and measured 594 feet (36 rods) east from the middle of the county road. Elliotte testified that they crimped a penny over the barbed wire and tied red flags on the fence at the 594-foot line of both the north and the south ends of the properties.

After this, George's crops were farmed on the west side of the boundary and were planted in a north-south direction. Eugene planted his crops on the east side of the boundary in an east-west direction. An aerial photograph from 1966 shows a clear demarcation between the two parcels that appears to be parallel to the county road from which the boundary had been measured.

Elliotte testified that over time, the red flags wore away. Along the north barbed wire fence, a row of trees grew up. Eventually, a tree grew into the barbed wire fence where the penny was crimped. The fence and the penny remained visible, however, embedded in a knot in the tree. The trees were later cut down, but the stumps remained, including the stump containing a piece of the barbed wire with a crimped penny around it. It is unclear when exactly the tree grew into the fence or when it was cut down, but, in any event, there is no evidence that the basic location of the crimped penny changed.

In 1965, Kirk moved into a mobile home placed on the southeast corner of Eugene's 60 acres. As part of the improvements around the home, they removed the barbed wire fence on the south end of the property. However, Kirk testified that before removing the fence, they placed a water well "right next to the property line" that was designated by the crimped penny in the south fence. Elliotte similarly testified that Kirk and George discussed the placement of the well and agreed to set it "kind of on the line" between the two properties. Although Kirk sought George's approval of the placement, there is no indication that Kirk asked George's permission to place the well on George's property. Rather, it appears that the discussion was to ensure

that the well was placed on Eugene's property. Elliotte testified that after the removal of the fence in 1965, the well was understood by George and Eugene to be the south visual marker for the boundary between their properties.

Elliotte testified that George and Eugene farmed their respective lands in accordance with the well on the south end and the crimped penny on the north end for 21 years. When George died in 1986, his 18 acres passed to his wife, Anna Saunders, who put the land into a trust. Eugene and Elliotte continued to farm Eugene's 60-acre parcel, and they also farmed Anna's land for the trust, but they maintained the crop boundary line according to the well/stump boundary.

When Eugene died in 1989, Elliotte continued to farm Anna's land and the 20 abutting acres inherited at this time by Kirk. At this time, Elliotte decided, for the sake of efficiency, to farm Kirk's 20 acres and Anna's 18 acres together without planting the crops in differing directions. Elliotte stated that he still considered the well and the tree stump as boundary markers. The evidence was inconclusive as to whether Anna or her trustee specifically recognized the well/stump boundary markers. Elliotte gave Anna's trust her share of the profits from the crops and divided the proceeds from the 20 acres between himself and Kirk.

Sila purchased the 18 acres from Anna's trust in 2001. He did not notice any demarcation between Anna's and Kirk's parcels at that time. Neither did he have a survey of the property conducted prior to the purchase to mark the boundary in accordance with the legal description. Sila testified that the real estate agent referred to the property line's being near a "high line pole" on the east end of the field in reference to the division of the properties. The location of this pole is not reflected in the record.

In 2005, Sila employed Fred Franklin, a licensed land surveyor, to survey and create a plat of his land. Franklin discovered that the centerline of the county road along the west side of Sila's property did not, in fact, as George and Eugene had believed, correspond to the section line. Franklin explained that while the county tries to build its roads to correlate to the section lines, this was not always possible, and that, in any event,

the centerline of roads can shift slightly over the years. Franklin did not notice either a stump or a well as visual markers of a boundary line. Franklin's survey demonstrates that the platted boundary of Sila's property lies east of the boundary claimed by Kirk.

Douglas Mordhorst, a registered land surveyor, was then hired by Kirk to survey the 18 acres in accordance with the stump and the well as boundary markers. With Elliotte's assistance, Mordhorst was able to pinpoint the location of these markers. Elliotte testified that since the dispute with Sila began, someone had covered the well with dirt such that it was no longer visible. Also, someone had dug up the stump and thrown it some distance away from its original location. Elliotte was able to retrieve the stump itself as evidence. He was able to find the stump's prior location by excavating its remainder from underground in the midst of a row of above-ground stumps along the north border of the properties. Because Elliotte was familiar with the location of the well, they were also easily able to excavate it.

Mordhorst's survey used the stump as the northeast corner and used the west edge of the well to reference the southeast corner, such that the entirety of the well was within Kirk's property. The survey also set forth the boundary of the property in accordance with its legal description, measuring from the actual section line on the west side. Mordhorst's and Franklin's surveys agree as to the boundary that correlates to the legal description of the property.

Mordhorst's survey illustrates the disputed area as a trapezoid that is narrower on the south end, encroaching approximately 5 fewer feet into the legally described 18 acres on the south end than on the north. The boundary Elliotte testified was recognized by George and Eugene thus did not run exactly parallel to the west road. Mordhorst testified that the printed exhibit representing the survey was not completely proportionate. Although the survey was to scale in the east-west direction, it was compressed in the north-south direction to fit onto a legal-sized sheet of paper. Mordhorst's survey established that there was a total of .264 of an acre in issue between the parties.

The district court ruled in favor of Sila, finding that Sila was the owner of the property in accordance with the boundary

described in the original plat. In its findings of fact, the court noted that while the aerial photograph showed the boundary as being parallel to the road, the exhibit representing Mordhorst's survey did not show a parallel line, and that thus, "it is not possible that the tract could be as Elliotte testified."

Furthermore, the court opined that as a matter of law, mutual acquiescence can only determine a boundary that is unknown. Since the true location of the boundary was set forth by the property's legal description and was readily ascertainable through conventional surveying techniques, the court concluded it was "known." Moreover, the court stated that Elliotte's mere opinion that the stump and well were a "demarcation of ownership" was insufficient to prove by a "preponderance of credible, competent evidence" that those markers were not simply considered by George and Eugene as a "temporary agreement" or "approximation" of the boundary. The court also rejected Kirk's adverse possession claim. Kirk appeals.

ASSIGNMENTS OF ERROR

Kirk assigns, consolidated, that the district court erred in (1) determining that he had not established title to the disputed tract under the theory of mutual recognition and acquiescence, (2) holding that the filial relationship rule applies to his mutual recognition and acquiescence defense, and (3) failing to find that the stump and the well established the boundary line.

STANDARD OF REVIEW

Actions brought under § 34-301 are in equity.[1] As such, we review the record de novo and reach an independent conclusion without reference to the conclusion reached by the trial court; except, however, that where credible evidence is in conflict, we give weight to the fact that the trial court saw the witnesses and observed their demeanor while testifying.[2]

ANALYSIS

[1] Under the doctrine of mutual recognition and acquiescence, while a boundary may be fixed in accordance with a

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[1] *Spilinek v. Spilinek*, 215 Neb. 35, 337 N.W.2d 122 (1983).

[2] *Id.*

survey, when a different boundary is shown to have existed between the parties for the 10-year statutory period, it is that boundary line which is determinative and not that of the original survey.[3] We have explained: "'The rule long established in this jurisdiction is that where a boundary, supposed to be the true line established by the government survey, is acquiesced in by the adjoining owners for more than ten years, it is conclusive of the location.'"[4]

The district court, in concluding that the well/stump boundary was not established by mutual acquiescence, relied on *Hakanson v. Manders*[5] for the proposition that the doctrine is simply unavailable when a deed to the disputed land sets forth clearly a known and certain metes and bounds description. This has never been the law. In *Hakanson*, we quoted the following statement from American Jurisprudence:

> "The cases approving the doctrine of acquiescence generally do not differentiate between cases where the boundary was uncertain or in doubt at the time it was first acquiesced in and cases where it was known and certain. However, in the second case, only adverse possession can avail the person claiming under the boundary so recognized."[6]

But, in *Lynch v. Egan*,[7] we rejected the landowner's argument that the boundary could not have been established by mutual recognition and acquiescence because the true line could have been ascertained by employing a county surveyor, stating: "[W]e do not understand the rule to be that in order that an agreement of that kind should be binding, the true line should be absolutely unascertainable."[8] As explained by the California

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[3] See *Kraft v. Mettenbrink*, 5 Neb. App. 344, 559 N.W.2d 503 (1997). See, also, *Matzke v. Hackbart*, 224 Neb. 535, 399 N.W.2d 786 (1987); *Converse v. Kenyon*, 178 Neb. 151, 132 N.W.2d 334 (1965); *Romine v. West*, 134 Neb. 274, 278 N.W. 490 (1938).

[4] *Hausner v. Melia*, 212 Neb. 764, 772-73, 326 N.W.2d 31, 37 (1982) (emphasis omitted).

[5] *Hakanson v. Manders*, 158 Neb. 392, 63 N.W.2d 436 (1954).

[6] *Id.* at 396, 63 N.W.2d at 439, quoting 8 Am. Jur. *Boundaries* § 72 (1937).

[7] *Lynch v. Egan*, 67 Neb. 541, 93 N.W. 775 (1903).

[8] *Id.* at 546, 93 N.W. at 777.

Supreme Court in *Price v. De Reyes*,[9] in fact, "[i]t is only where the true location is subsequently ascertained that actions of this kind arise." Thus, in other mutual recognition and acquiescence cases, although not directly addressing this issue, we have affirmed a boundary by mutual recognition and acquiescence even though an ascertainable metes and bounds description was apparently described by deed.[10]

[2] In *Lynch*, we explained that what was important was that the true line was actually unknown and uncertain to the parties acquiescing in the boundary. The parties were free to forgo the expense and trouble of having a survey conducted and to agree upon a division line. As stated by another court, "the fact that an accurate survey is possible is not conclusive of the question whether a doubt exists as to the location of a boundary."[11] It is the uncertainty in the minds of the landowners of the line *on the ground* that is relevant to the ability to acquiesce to a boundary, not the uncertainty in the written description of the deed.[12] That the true boundary is "knowable" because the deed contains a metes and bounds description that a registered surveyor could have properly marked on the land—but did not—does not preclude the property owners from acquiescing in a boundary they believe corresponds with the deed's description.[13]

The court alternatively found that Kirk had failed to prove that the well/stump line was anything other than "an approximation of the line . . . on a temporary basis." We disagree. In our de novo review of the evidence, it is apparent that George and Eugene understood the boundary they had marked to be the permanent, actual boundary between the properties. The boundary was set after being carefully measured and marked. The fact that

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[9] *Price v. De Reyes*, 161 Cal. 484, 489, 119 P. 893, 895 (1911).

[10] See, *Hausner v. Melia, supra* note 4; *Romine v. West, supra* note 3.

[11] *Kirkegaard v. McLain*, 199 Cal. App. 2d 484, 491, 18 Cal. Rptr. 641, 645 (1962).

[12] *Norwood v. Stevens*, 104 Idaho 44, 655 P.2d 938 (Idaho App. 1982).

[13] See, *Lynch v. Egan, supra* note 7; *Piotrowski v. Parks*, 39 Wash. App. 37, 691 P.2d 591 (1984); *Sanlando Springs Animal Hosp. v. Douglass*, 455 So. 2d 596 (Fla. App. 1984); *Wampler v. Sherwood*, 281 Or. 261, 574 P.2d 319 (1978); *Nunley v. Walker*, 13 Utah 2d 105, 369 P.2d 117 (1962).

there may have been error in the measurement, or even further error in the placement of the well, does not make the boundary established by the markers and recognized for 21 years thereafter a "temporary agreement" or "approximation."

The evidence is that the brothers, George and Eugene, farmed the land in opposite directions to keep their respective ownership clear. They each kept the profits from their respective crops. There is nothing in the record from which we could infer that George and Eugene simply did not care whether one of them was profiting off the other's land. Nor is there evidence that the boundary markers were not mutually recognized as the real boundary between the properties. Elliotte specifically testified that Eugene, his father, and George, his uncle, meant "[t]o split the farm up to get a boundary line so [George] knew what he owned and what my dad owned."

[3] That one of the crimped pennies was replaced by a well that might not have exactly corresponded to the initial measurement is of little consequence, because the well was actually acquiesced to as the south boundary marker for the statutory period. The fence on the south side with the crimped penny was there only for 3 years, until 1965. Nothing in Elliotte's testimony indicates that from 1965 to 1989, the crop line dividing the two farms ever changed. And Elliotte was intimately aware of this boundary because he farmed the land with Eugene during this period. That a boundary line is, in fact, an approximation of the real boundary, does not preclude a finding of mutual recognition and acquiescence, so long as the acquiescing parties recognized this approximation as their actual boundary. Insofar as there appears to be a crop line parallel to the road in the 1966 aerial photograph, we do not, as the district court did, find this to be contradictory to Kirk's claim. We have no reason to believe that a 5-foot variance from the parallel, in the boundary of an 18-acre property, would be readily discernible in an aerial photograph that was obviously taken from a great distance.

[4] Sila asserts that regardless of the other evidence, the filial relationship rule must defeat Kirk's claim. The filial relationship rule is recognized in adverse possession claims and establishes a rebuttable presumption that the use of the land was permissive

when the occupier of the land is a relative of the true owner.[14] This is relevant to claims of adverse possession because permissive use is inconsistent with the necessary element of hostility: that the true owner had actual or constructive notice that his or her title was in danger.[15] But, as noted recently by the Nebraska Court of Appeals in *Campagna v. Higday*,[16] the filial relationship rule has never been applied to a case involving a claim of mutual recognition and acquiescence. And the doctrine of mutual recognition and acquiescence does not rely on hostile possession—to the contrary, it depends on the landowners' agreement as to the boundary between their properties. We conclude that the filial relationship rule has no bearing on a mutual recognition and acquiescence analysis.

Finally, Sila argues that the evidence of the mutual recognition and acquiescence is insufficient because Kirk only presented his own testimony and that of his brother, Elliotte, who, Sila asserts, is biased in Kirk's favor. Sila points out that there was no testimony from neighbors or other witnesses to confirm Elliotte's and Kirk's testimony.

[5] In order for mutual recognition and acquiescence to operate, there must be an assent, by words, conduct, or silence, in a line as the boundary.[17] Elliotte's and Kirk's testimony established such conduct by a preponderance of the evidence. We will not discredit the testimony of Elliotte merely because he is Kirk's brother, just as we do not discredit Kirk's testimony merely because he is a party to the action. And the conduct of the various landowners between 1962 and 1989, established by physical evidence, substantiates Elliotte's and Kirk's testimony. It was Sila's burden to bring forth conflicting testimony if he thought it existed. As the record is presented to us, we find little dispute that George and Eugene in fact mutually recognized and acquiesced to the boundary represented in Mordhorst's survey, and we so find. Having found that the boundary was established

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[14] See, e.g., *Petsch v. Widger*, 214 Neb. 390, 335 N.W.2d 254 (1983).

[15] *Wanha v. Long*, 255 Neb. 849, 587 N.W.2d 531 (1998).

[16] *Campagna v. Higday*, 14 Neb. App. 749, 714 N.W.2d 770 (2006).

[17] See *Spilinek v. Spilinek, supra* note 1.

by mutual recognition and acquiescence, we need not address Kirk's alternative theory that the boundary was established by adverse possession.

CONCLUSION

For the foregoing reasons, we reverse the judgment of the district court, and remand the cause with directions to enter judgment in favor of Kirk and to set the boundary between the properties in accordance with the stump and well markers as represented in the Mordhorst survey.

REVERSED AND REMANDED WITH DIRECTIONS.

AARON J. STENGER, APPELLEE, V. DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF NEBRASKA AND BEVERLY NETH, DIRECTOR OF THE DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF NEBRASKA, APPELLANTS.

743 N.W.2d 758

Filed January 11, 2008. No. S-06-1176.

1. **Constitutional Law: Statutes: Appeal and Error.** Whether a statute is constitutional is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision reached by the court below.
2. **Moot Question.** A case becomes moot when the issues initially presented in litigation cease to exist or the litigants lack a legally cognizable interest in the outcome of litigation.
3. **Constitutional Law: Statutes: Proof.** The burden of establishing the unconstitutionality of a statute is on the one attacking its validity.
4. **Constitutional Law: Statutes: Presumptions.** A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality.
5. **Constitutional Law: Statutes: Proof.** The unconstitutionality of a statute must be clearly demonstrated before a court can declare the statute unconstitutional.
6. **Due Process: Notice.** Procedural due process limits the ability of the government to deprive people of interests which constitute "liberty" or "property" interests within the meaning of the Due Process Clause and requires that parties deprived of such interests be provided adequate notice and an opportunity to be heard.
7. **Motor Vehicles: Licenses and Permits: Revocation.** Suspension of issued motor vehicle operators' licenses involves state action that adjudicates important property interests of the licensees.
8. **Administrative Law: Motor Vehicles: Licenses and Permits: Due Process.** Before a state may deprive a motorist of his or her driver's license, that state must provide a forum for the determination of the question and a meaningful hearing appropriate to the nature of the case.

9. **Administrative Law: Due Process: Notice: Evidence.** In proceedings before an administrative agency or tribunal, procedural due process requires notice, identification of the accuser, factual basis for the accusation, reasonable time and opportunity to present evidence concerning the accusation, and a hearing before an impartial board.

Appeal from the District Court for Platte County: ROBERT R. STEINKE, Judge. Reversed and remanded with directions.

Jon Bruning, Attorney General, Edward G. Vierk, and Milissa Johnson-Wiles for appellants.

William D. Kurtenbach, of Kurtenbach Law Office, for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

WRIGHT, J.

NATURE OF CASE

The Department of Motor Vehicles and its director, Beverly Neth (collectively the Department), appeal the judgment of the district court for Platte County which concluded that "the ALR [administrative license revocation] statutory scheme for enhancement" denied Aaron J. Stenger due process of law and that "the Director accordingly erred in enhancing the period of Stenger's revocation from 90 days to 1 year."

SCOPE OF REVIEW

[1] Whether a statute is constitutional is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision reached by the court below. *Chase v. Neth*, 269 Neb. 882, 697 N.W.2d 675 (2005).

FACTS

On April 23, 2006, an officer of the Columbus Police Department arrested Stenger for operating a vehicle in violation of Neb. Rev. Stat. § 60-6,196 (Reissue 2004). The chemical test of Stenger's blood revealed a blood alcohol content of .125. After his arrest, Stenger was given a "NOTICE/SWORN REPORT/TEMPORARY LICENSE" (temporary license), which was valid for 30 days. The back of the temporary license stated:

"**ACCORDINGLY, NOTICE IS HEREBY GIVEN THAT YOUR OPERATOR'S LICENSE AND/OR OPERATING PRIVILEGE WILL BE REVOKED IN THIRTY DAYS FOR A PERIOD OF**: (B) . . . (3) One year, if your test results was [sic] **0.08** or more and you have ONE OR MORE PRIOR revocations within a 12-year period . . . ." The temporary license also provided that

> [t]he Director will consider the following issues at the hearing . . . .
>
> (1) Whether the law enforcement officer had probable cause to believe you were operating or in the actual physical control of a motor vehicle in violation of Section 60-6,196 or a city or village ordinance enacted pursuant to Section 60-6,196;
>
> (2) Whether you were operating or in actual physical control of a motor vehicle with an alcohol concentration of **0.08** or more.

On June 7, 2006, an administrative license revocation (ALR) hearing was held. During the hearing, a certified copy of Stenger's driving abstract was offered into evidence by the hearing officer. The abstract, a document maintained in the Department's computerized records, indicated that Stenger had a prior license revocation. Stenger objected to the offering of the abstract, claiming that the abstract was "not within the issues for an ALR hearing" and that receipt of the abstract would violate Stenger's due process rights because he was unable to challenge its validity. However, Stenger made no showing or mention to the hearing officer of any actual inaccuracy appearing on the abstract at that time or at any other time during the proceedings. The hearing officer overruled the objection and received the abstract into evidence.

On June 13, 2006, the director adopted the hearing officer's "Proposed Findings of Facts, Proposed Conclusions of Law, and Recommended Order of Revocation." In the order, the director found that Stenger had a prior revocation and consequently revoked Stenger's driver's license and operating privileges for a period of 1 year, effective June 14. Stenger appealed the director's decision to the Platte County District Court pursuant

to the Administrative Procedure Act, Neb. Rev. Stat. § 84-901 et seq. (Reissue 1999 & Cum. Supp. 2004).

In his petition for judicial review, Stenger alleged that he was deprived of due process of law because the Department, without notice or opportunity to challenge or present evidence, expanded the issues at the ALR hearing to include evidence pertaining to a prior ALR revocation. The district court concluded that the ALR statutory scheme for enhancement denied Stenger due process. It therefore reduced Stenger's revocation from 1 year to 90 days. The court affirmed the director's order of revocation to that extent. Because the court determined Stenger was denied due process of law with respect to the director's enhancement determination, the court modified the director's order to reflect that Stenger's Nebraska driver's license and/or operating privileges should be revoked for the statutory period without enhancement, namely 90 days. The Department appealed.

Stenger has completed the 90-day revocation and now argues that the case is moot. The Department argues that the case is not moot because Stenger may be required to complete an additional 270 days of revocation or, alternatively, the public interest exception applies.

ASSIGNMENTS OF ERROR

The Department claims, consolidated and restated, that the district court erred in finding that Stenger was denied due process because he was not afforded notice and an opportunity to be heard regarding any challenge to the accuracy of the Department's record establishing the prior ALR that was used for enhancement of his revocation.

ANALYSIS

Preliminary Question of Mootness

Stenger claims this action is moot because he has already completed the 90-day revocation. However, the Department argues that 270 days of revocation are still in dispute or that the public interest exception applies.

[2] A case becomes moot when the issues initially presented in litigation cease to exist or the litigants lack a legally cognizable interest in the outcome of litigation. *Rath v. City of*

Sutton, 267 Neb. 265, 673 N.W.2d 869 (2004). For the reasons set forth herein, we conclude that the action is not moot. The district court held that the ALR statutory scheme for enhancement denied Stenger due process of law. The constitutionality of a statute is squarely before us.

We therefore proceed to address the constitutionality of the ALR statutory scheme.

Constitutionality of ALR Statutory Scheme

Neb. Rev. Stat. § 60-498.01 (Reissue 2004) provides for revocation of the driver's license of any person who has shown himself or herself to be a health and safety hazard (1) by driving with an excessive concentration of alcohol in his or her body or (2) by driving while under the influence of alcohol. As a part of the ALR statutory scheme, any arrested person who desires a hearing and has been served with a notice of revocation may file a petition requesting a hearing. See § 60-498.01(5)(c). Section 60-498.01(6) provides:

> (c) At hearing the issues under dispute shall be limited to:
>
> . . . .
>
> (ii) If the chemical test discloses the presence of alcohol in a concentration specified in section 60-6,196:
>
> (A) Did the peace officer have probable cause to believe the person was operating or in the actual physical control of a motor vehicle in violation of section 60-6,196 . . . and
>
> (B) Was the person operating or in the actual physical control of a motor vehicle while having an alcohol concentration in violation of subsection (1) of section 60-6,196.

Neb. Rev. Stat. § 60-498.02 (Reissue 2004) provides that a revocation is for 90 days unless the person's driving abstract shows one or more prior revocations in the previous 12 years. The question presented is whether Stenger was afforded notice and an opportunity to be heard regarding the issue of enhancement pursuant to § 60-498.02.

[3-5] The burden of establishing the unconstitutionality of a statute is on the one attacking its validity. *Chase v. Neth*, 269 Neb. 882, 697 N.W.2d 675 (2005). A statute is presumed to be constitutional, and all reasonable doubts will be resolved

in favor of its constitutionality. *Id.* The unconstitutionality of a statute must be clearly demonstrated before a court can declare the statute unconstitutional. *Id.*

In the case at bar, the district court concluded that the ALR statutory scheme violated the procedural due process rights of motorists who were subject to an enhanced penalty for a prior revocation because the statutory scheme did not provide notice that enhancement would be an issue at the ALR hearing. We consider this a determination by the district court that the ALR scheme was unconstitutional as applied to Stenger in the enhancement of his license revocation.

[6,7] Procedural due process limits the ability of the government to deprive people of interests which constitute "liberty" or "property" interests within the meaning of the Due Process Clause and requires that parties deprived of such interests be provided adequate notice and an opportunity to be heard. *Kenley v. Neth*, 271 Neb. 402, 712 N.W.2d 251 (2006), *modified* 271 Neb. 683, 716 N.W.2d 44. Suspension of issued motor vehicle operators' licenses involves state action that adjudicates important property interests of the licensees. *Id.* Thus, the property interest involved here is Stenger's interest in retaining his driving privileges.

[8,9] Before a state may deprive a motorist of his or her driver's license, that state must provide a forum for the determination of the question and a meaningful hearing appropriate to the nature of the case. *Id.* In proceedings before an administrative agency or tribunal, procedural due process requires notice, identification of the accuser, factual basis for the accusation, reasonable time and opportunity to present evidence concerning the accusation, and a hearing before an impartial board. *Id.*

The basic question presented is whether Stenger received notice that his prior ALR would be used for purposes of enhancement and whether he was provided a reasonable opportunity to be heard on this issue.

The back of the temporary license provided to Stenger by the police officer stated:

> **ACCORDINGLY, NOTICE IS HEREBY GIVEN THAT YOUR OPERATOR'S LICENSE AND/OR**

> **OPERATING PRIVILEGE WILL BE REVOKED IN THIRTY DAYS FOR A PERIOD OF**:
>
> (B)(1) One year, if you refused the chemical test.
>
> (2) Ninety days, if your test result was **0.08** or more alcohol concentration and you do not have a prior revocation as described in paragraph (A) above.
>
> (3) One year, if your test results was [sic] **0.08** or more and you have ONE OR MORE PRIOR revocations within a 12-year period as described in paragraph (A) above.

At the June 7, 2006, ALR hearing, the hearing officer offered into evidence a copy of Stenger's driving abstract. Exhibit 2, which was entitled "COMPLETE ABSTRACT OF RECORD[,] NEBRASKA DEPARTMENT OF MOTOR VEHICLES," included a certification that it was a true and correct abstract of Stenger's driving record as contained in the Department's files. The exhibit contained an entry showing that Stenger had received a 90-day license revocation on November 10, 1998.

This abstract was maintained by the Department and was open to Stenger's inspection. See Neb. Rev. Stat. § 60-483 (Reissue 2004). At the ALR hearing, when exhibit 2 was offered into evidence, Stenger objected, stating:

> And I'll object to the abstract because the — it is not within the issues for an ALR hearing as set forth in Section 60-498.01 paragraph 6C(2). Further, we would object to that exhibit because we don't have an opportunity to challenge the validity of the [Department of Motor Vehicles] record, which purportedly shows a prior ALR revocation and therefore denies us due process.

Stenger made no showing to the hearing officer that the abstract contained any inaccuracy pertaining to his driving record or the prior ALR revocation. The hearing officer overruled the objection and received exhibit 2 into evidence.

The foundation for Stenger's attack of the ALR proceeding is based upon his claim that "[w]hen the Administrative License Revocation (ALR) statutory scheme (60-498.01 through 60-498.04, R.R.S., 1943 (Reissue 2004)), is examined, it is readily apparent that [Stenger] did not have any opportunity to challenge the actual existence of any prior ALR revocation

which may appear on his driving abstract." See brief for appellee at 5-6. He relies upon § 60-498.01(6)(c)(ii), which he claims limits the issues under dispute at an ALR hearing to the following:

> (A) Did the peace officer have probable cause to believe the person was operating or in the actual physical control of a motor vehicle in violation of section 60-6,196 . . . and
>
> (B) Was the person operating or in the actual physical control of a motor vehicle while having an alcohol concentration in violation of subsection (1) of section 60-6,196.

Stenger further argues that pursuant to § 60-498.02(1), the inquiry into whether a motorist had a prior ALR is not addressed until after the ALR hearing has been held and the director has made a finding that the motorist's license should be revoked. He asserts that under this statutory scheme where the issue of whether Stenger had a prior ALR (which could enhance the period of revocation from 90 days to 1 year) is only considered after the hearing is concluded, he has not been given an opportunity to challenge the actual existence of the prior ALR revocation.

Stenger relies on *Hass v. Neth*, 265 Neb. 321, 657 N.W.2d 11 (2003), and § 60-498.01 to support his contention that the issues at the revocation hearing are limited to whether the officer had probable cause to believe that the person was operating or in control of the motor vehicle in violation of § 60-6,196 and whether such person had a blood alcohol concentration in violation of § 60-6,196.

Our holding in *Hass* does not prevent the consideration of a motorist's driving abstract for enhancement purposes. *Hass* dealt with the exclusion of Fourth Amendment search and seizure issues. In *Hass*, we found that forcing the State to litigate every element of a "driving under the influence" case at an ALR hearing would seriously undermine the Legislature's goal of providing an informal and prompt review of the decision to suspend a driver's license. We did not discuss the issue of enhancement or the admissibility of the motorist's driving abstract at the ALR hearing. The issue of enhancement under § 60-498.02(1) was not raised in *Hass*.

We do not interpret § 60-498.01 to exclude the receipt of evidence for the purpose of enhancement at a revocation hearing either. Although this section limits the issues under dispute, it does not prohibit evidence pertinent to the ultimate disposition of a case after those issues have been resolved. Whether a person's driver's license has previously been revoked is relevant evidence in determining the length of the revocation under § 60-498.02(1)(b).

Therefore, we conclude that § 60-498.01 does not bar the receipt of a driving abstract to enhance a revocation, and we hold that a driving abstract may be admitted in an ALR proceeding for that purpose. This holding does not prohibit a party from contesting the accuracy of the abstract as to whether the party did in fact have a prior revocation. Section 60-498.02(1)(b) explicitly provides that if a driving abstract shows that the driver had a revocation in the prior 12 years, the revocation can be enhanced to 1 year. Therefore, the Legislature clearly intended for the Department to consider such matter in the ALR proceedings.

The driving abstract introduced at the administrative hearing showed that Stenger had an ALR in the preceding 12 years. The record also shows that the Department, in response to Stenger's motion for discovery, sent to Stenger his driving abstract, a copy of the temporary license already provided to him, and the results of his blood alcohol test.

The record indicates that Stenger received a copy of his abstract on May 23, 2006. The matter came on for hearing before the hearing officer at 1:30 p.m. on June 7. After the hearing officer offered Stenger's driving abstract into evidence, Stenger had the opportunity to argue or present evidence supporting his claim as to the accuracy of the abstract.

After the hearing, the hearing officer prepared the following recommended order:

> Upon consideration of the Proposed Findings of Fact and Proposed Conclusions of Law, it is recommended that the Director of the Department of Motor Vehicles find: the peace officers had probable cause to believe Appellant [Stenger] was operating or in the actual physical control of a motor vehicle in violation of Neb. Rev. Stat.

> Sec. 60-6,196 or a city or village ordinance enacted pursuant to such section; that the Appellant was operating or in the actual physical control of a motor vehicle while having an alcohol concentration in violation of subsection (1) of section 60-6,196[;] and that the Appellant has a prior Administrative License Revocation.

The director of the Department adopted the proposed findings of fact and conclusions of law and ordered that Stenger's Nebraska operator's license and operating privileges be revoked for 1 year, effective June 14, 2006.

We conclude that the district court erred as a matter of law in determining that Stenger was denied due process. The record establishes that Stenger was not denied either notice or the opportunity to challenge the accuracy of the driving abstract used for enhancement of his revocation. Stenger was given notice that enhancement would be at issue when he was given a copy of his driving abstract, which was the basis of the enhancement ordered by the director. The temporary license stated that his operator's license and/or operating privileges would be revoked for 1 year if his test result was .08 or more and he had one or more prior revocations within a 12-year period. The abstract was then offered by the Department at the hearing. The Department, by giving Stenger such notice and by furnishing him with a copy of his driving abstract which showed a prior revocation within a 12-year period, complied with the requirements of due process.

Section 60-498.02(1)(b) gives notice that if a driving abstract shows that the driver had a previous revocation in the prior 12 years, then the revocation will be enhanced to 1 year. Given the facts that the statute so provides and that Stenger was furnished a copy of the abstract on May 23, 2006, which was offered in evidence by the Department to enhance the revocation, we conclude that the requirements of due process have been met. Stenger had notice of the prior revocation and an opportunity to contest the existence of that revocation at the hearing.

CONCLUSION

The district court erred in finding that Stenger was denied due process of law with respect to the director's ALR enhancement

determination. For the reasons stated herein, we reverse the judgment of the district court and remand the cause to the court with directions that it affirm the decision of the director to revoke Stenger's license for a period of 1 year. Stenger is to be given credit for the 90 days of revocation already completed.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, v. EDOUARDO ZENDEJAS, RESPONDENT.

743 N.W.2d 765

Filed January 18, 2008. No. S-06-269.

1. **Disciplinary Proceedings.** A proceeding to discipline an attorney is a trial de novo on the record.
2. **Disciplinary Proceedings: Proof.** To sustain a charge in a disciplinary proceeding against an attorney, a charge must be supported by clear and convincing evidence.
3. **Disciplinary Proceedings.** Violation of a disciplinary rule concerning the practice of law is a ground for discipline.
4. **Disciplinary Proceedings: Appeal and Error.** When no exceptions to the referee's findings of fact are filed by either party in an attorney discipline proceeding, the Nebraska Supreme Court may, in its discretion, consider the referee's findings final and conclusive.
5. **Disciplinary Proceedings.** The basic issues in a disciplinary proceeding against an attorney are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances.
6. ____. Each attorney discipline case must be evaluated individually in light of its particular facts and circumstances.
7. ____. For purposes of determining the proper discipline of an attorney, the Nebraska Supreme Court considers the attorney's acts both underlying the events of the case and throughout the proceeding. The determination of an appropriate penalty to be imposed on an attorney in a disciplinary proceeding also requires the consideration of any aggravating or mitigating factors.

Original action. Judgment of suspension.

Kent L. Frobish, Assistant Counsel for Discipline, for relator.

Edouardo Zendejas, pro se.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

PER CURIAM.

INTRODUCTION

The office of the Counsel for Discipline of the Nebraska Supreme Court filed formal charges against respondent, Edouardo Zendejas. After a formal hearing, the referee concluded that Zendejas had violated the Code of Professional Responsibility and recommended a suspension of 30 days. While we adopt the findings of the referee and conclude that Zendejas violated the Code of Professional Responsibility and the Nebraska Rules of Professional Conduct, we do not accept the discipline recommended by the referee. We instead impose discipline as indicated below.

FACTS

On August 3, 2006, formal charges were filed by the office of the Counsel for Discipline against Zendejas. Those formal charges set forth one count, that Zendejas had violated the following provisions of the Code of Professional Responsibility: Canon 1, DR 1-102(A)(1) (violating disciplinary rule); Canon 6, DR 6-101(A)(3) (neglecting legal matter); Canon 9, DR 9-102(B)(3) (failing to render appropriate account records to client); and DR 9-102(B)(4) (failing to promptly pay as requested by client funds that client is entitled to receive). The formal charges also alleged that Zendejas violated Neb. Ct. R. of Prof. Cond. 8.4(d) (rev. 2005) (engaging in conduct prejudicial to administration of justice), as well as his oath of office as an attorney.[1] In his answer, Zendejas disputed these allegations.

A referee's hearing was held on March 5, 2007. Zendejas, acting pro se, testified during the hearing. In addition, 18 exhibits were introduced into evidence. The referee's findings were announced in an April 5 report. The substance of those findings is as follows:

Zendejas was admitted to the practice of law in the State of Nebraska in 1991. He is authorized to practice law in several

[1] Neb. Rev. Stat. § 7-104 (Reissue 1997).

tribal courts, including the Ponca Tribal Court and the Winnebago Tribal Court. Zendejas has worked full time as general counsel for the Omaha Tribe and teaches in the native studies department at the University of Nebraska at Omaha.

In approximately November 2003, Zendejas was retained by William Zuck to represent Zuck in a postconviction action in district court. Zendejas had not previously handled a postconviction action. On November 21, Zuck paid Zendejas $9,000. On December 3, 2004, Zuck paid Zendejas an additional $5,000.

Between November 2003 and October 2005, Zendejas failed to file a postconviction action on behalf of Zuck, despite his receipt of $14,000 from Zuck. On October 7, 2005, the Counsel for Discipline received a letter from Zuck regarding Zendejas' representation, in which Zuck sought, inter alia, a refund from Zendejas of moneys paid. On October 11, the Counsel for Discipline forwarded Zuck's letter to Zendejas and requested a written response. The Counsel for Discipline received no response and, on November 18, sent another letter to Zendejas requesting a response to Zuck's letter. On November 29, Zendejas notified the Counsel for Discipline that Zuck would be reimbursed in the amount of $11,368 within 10 days and that Zendejas would retain $2,632 in out-of-pocket expenses. Zuck notified the Counsel for Discipline that he would accept the $11,368 payment in settlement of his claim.

However, Zendejas did not reimburse Zuck within 10 days. On January 5, 2006, Zendejas was directed to provide to the Counsel for Discipline a copy of the refund check he had sent to Zuck. No response was received, and on January 19, the Counsel for Discipline again wrote Zendejas requesting a response to the January 5 letter. On January 27, the Counsel for Discipline converted Zuck's original letter of complaint into a grievance under Neb. Ct. R. of Discipline 9(E) (rev. 2001). The Counsel for Discipline sent Zendejas a certified letter directing Zendejas to answer, within 15 days, specific questions about his representation of Zuck.

On January 31, 2006, Zendejas replied to the Counsel for Discipline's January 27 letter, but did not answer the specific questions posed. Rather, Zendejas indicated that his failure to pay was the result of delays in a real estate closing. On

February 21, Zendejas sent to the Counsel for Discipline a letter and a copy of a check for $7,000 payable to Zuck. In the letter, Zendejas indicated that the balance would be paid to Zuck within 30 days. On that same day, the Counsel for Discipline informed Zendejas, via letter, that it was still requesting a written response to its January 27 letter.

Zuck eventually received the $7,000 check during the week of March 12, 2006. No explanation was given in the record as to the delay between the time the copy of the check was mailed to the Counsel for Discipline and Zuck's receipt of the check. At oral argument, Zendejas claimed the delay was due to an issue in which the particular envelope he used to send the check had been rejected by the correctional facility holding Zuck.

On March 27, 2006, Zendejas replied to the Counsel for Discipline's January 27 letter requesting information regarding his representation of Zuck. In that response, Zendejas indicated he would pay Zuck the balance due of $4,368 "as early as tomorrow, March 28, 2006." However, the Counsel for Discipline did not receive a copy of the final check, in the amount of $4,340, until May 8. We note that the final amount paid to Zuck was $28 less than the amount Zendejas indicated would be paid to Zuck.

The referee issued his report on April 5, 2007. In that report, the referee concluded Zendejas' conduct was in violation of DR 1-102(A)(1), DR 6-101(A)(3), DR 9-102(B)(3) and (4), rule 8.4(d), and his oath as an attorney. The referee recommended that Zendejas be temporarily suspended from the practice of law for a period of 30 days. No exceptions to this report were filed. On April 18, the Counsel for Discipline filed a motion for judgment on the pleadings, requesting that this court accept the referee's recommendation and enter judgment thereon.

ANALYSIS

As an initial matter, we note that some of Zendejas' conduct at issue occurred prior to September 1, 2005, and is governed by the now-superseded Code of Professional Responsibility. Other conduct at issue occurred on or after September 1, 2005, the effective date of the Nebraska Rules of Professional Conduct, and is therefore governed by those rules.

[1-3] A proceeding to discipline an attorney is a trial de novo on the record.[2] To sustain a charge in a disciplinary proceeding against an attorney, a charge must be supported by clear and convincing evidence.[3] Violation of a disciplinary rule concerning the practice of law is a ground for discipline.[4]

[4] As noted, neither party filed any written exceptions to the referee's report. Pursuant to Neb. Ct. R. of Discipline 10(L) (rev. 2005), the Counsel for Discipline filed a motion for judgment on the pleadings. When no exceptions to the referee's findings of fact are filed by either party in an attorney discipline proceeding, the Nebraska Supreme Court may, in its discretion, consider the referee's findings final and conclusive.[5] Based upon the undisputed findings of fact in the referee's report, which we consider to be final and conclusive, we conclude the formal charges are supported by clear and convincing evidence. We specifically conclude that Zendejas has violated his oath of office as an attorney[6]; DR 1-102(A)(1), DR 6-101(A)(3), and DR 9-102(B)(3) and (4) of the Code of Professional Responsibility; and rule 8.4(d) of the Nebraska Rules of Professional Conduct. Accordingly, we grant in part the Counsel for Discipline's motion for judgment on the pleadings.

[5] We have stated that the basic issues in a disciplinary proceeding against an attorney are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances.[7] Neb. Ct. R. of Discipline 4 (rev. 2004) provides that the following may be considered as discipline for attorney misconduct:

> (A) Misconduct shall be grounds for:
> (1) Disbarment by the Court; or
> (2) Suspension by the Court; or

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[2] *State ex rel. Counsel for Dis. v. Petersen*, 272 Neb. 975, 725 N.W.2d 845 (2007).

[3] *Id.*

[4] *Id.*

[5] *State ex rel. Counsel for Dis. v. Wickenkamp*, 272 Neb. 889, 725 N.W.2d 811 (2007).

[6] § 7-104.

[7] *State ex rel. Counsel for Dis. v. Petersen, supra* note 2.

(3) Probation by the Court in lieu of or subsequent to suspension, on such terms as the Court may designate; or

(4) Censure and reprimand by the Court; or

(5) Temporary suspension by the Court; or

(6) Private reprimand by the Committee on Inquiry or Disciplinary Review Board.

(B) The Court may, in its discretion, impose one or more of the disciplinary sanctions set forth above.[8]

[6,7] With respect to the imposition of attorney discipline in an individual case, we have stated that each attorney discipline case must be evaluated individually in light of its particular facts and circumstances.[9] For purposes of determining the proper discipline of an attorney, this court considers the attorney's acts both underlying the events of the case and throughout the proceeding.[10] The determination of an appropriate penalty to be imposed on an attorney in a disciplinary proceeding also requires the consideration of any aggravating or mitigating factors.[11]

We have considered the applicable law as well as the referee's report and recommendation, the findings of which have been established by clear and convincing evidence. In his report, the referee recommended that with respect to the discipline to be imposed, Zendejas should be suspended from the practice of law for 30 days. We disagree with the referee's recommendation, and to the extent that the Counsel for Discipline's motion for judgment on the pleadings requests that this court accept the referee's recommendation with respect to discipline, we overrule that motion.

The formal charges in this case allege that Zendejas failed for nearly 2 years to file a postconviction action on Zuck's behalf. Such neglect is of serious concern to this court. In addition, we express concern with Zendejas' failure to "promptly

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[8] See, also, disciplinary rule 10(N).

[9] *State ex rel. Counsel for Dis. v. Wickenkamp, supra* note 5.

[10] *State ex rel. Counsel for Dis. v. Petersen, supra* note 2.

[11] *Id.*

pay" to Zuck funds that Zuck was entitled to receive.[12] Finally, Zendejas repeatedly ignored requests from the Counsel for Discipline regarding his representation of Zuck. We have held that an attorney's failure to respond to inquiries and requests for information from the office of the Counsel for Discipline is considered to be a grave matter and a threat to the credibility of attorney disciplinary proceedings.[13]

In his report, the referee did not note any aggravating factors with regard to the imposition of discipline, but did note some factors with respect to mitigation. In particular, the referee noted that Zendejas' "attitude at the hearing was one of regret and remorse." The referee also stated that Zendejas

> has provided commendable service to his tribal community and to the legal community. He is the juvenile court "presenting officer" handling cases involving the Indian Child Welfare Act. In that regard, he provides a valuable service to underrepresented children in the Indian community. [Zendejas] has also served on the Ponca Tribal Court Advisory Board and has provided services in connection with the Ponca Tribe's domestic violence project. Respondent has assisted the Ponca Tribe in revising its election ordinance; assisted in the development of family science nights at three reservation schools; and provided training to the Iowa Department of Social Services, Western Region, dealing with the Indian Child Welfare Act.

Based upon our consideration of the record in this case, this court finds that Zendejas should be and hereby is suspended from the practice of law for a period of 120 days, effective immediately. Zendejas shall comply with Neb. Ct. R. of Discipline 16 (rev. 2004) and, upon failure to do so, shall be subject to a punishment for contempt of this court. At the end of

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[12] See *State ex rel. Counsel for Dis. v. Rasmussen*, 266 Neb. 100, 662 N.W.2d 556 (2003).

[13] *State ex rel. Counsel for Dis. v. Gilroy*, 270 Neb. 339, 701 N.W.2d 837 (2005); *State ex rel. Counsel for Dis. v. James*, 267 Neb. 186, 673 N.W.2d 214 (2004); *State ex rel. NSBA v. Mefferd*, 258 Neb. 616, 604 N.W.2d 839 (2000).

the 120-day suspension period, Zendejas may apply to be reinstated to the practice of law, provided that Zendejas has demonstrated his compliance with rule 16 and further provided that the Counsel for Discipline has not notified this court that Zendejas has violated any disciplinary rule during his suspension. We also direct Zendejas to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 1997), disciplinary rule 10(P), and Neb. Ct. R. of Discipline 23(B) (rev. 2001) within 60 days after an order imposing costs and expenses, if any, is entered by this court.

CONCLUSION

The motion of the Counsel for Discipline is sustained in part and in part overruled. We adopt the referee's findings of fact and conclude that Zendejas has violated DR 1-102(A)(1), DR 6-101(A)(3), and DR 9-102(B)(3) and (4) of the Code of Professional Responsibility, and rule 8.4(d) of the Nebraska Rules of Professional Conduct, as well as his oath of office as an attorney.

It is the judgment of this court that Zendejas should be and hereby is suspended from the practice of law for 120 days, effective immediately.

JUDGMENT OF SUSPENSION.

STATE OF NEBRASKA, APPELLEE, V.
DARREN L. BOSSOW, APPELLANT.
744 N.W.2d 43

Filed January 18, 2008. No. S-07-099.

1. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, and an appellate court resolves such issues independently of the lower court's conclusions.
2. **Motions to Suppress: Search Warrants: Affidavits: Appeal and Error.** A trial court's ruling on a motion to suppress, based on a claim of insufficiency of the affidavit supporting issuance of a search warrant, will be upheld unless its findings are clearly erroneous. In making this determination, an appellate court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and considers it observed the witnesses.

3. **Criminal Law: Trial.** In criminal prosecutions, the withdrawal of a rest in a trial on the merits is within the discretion of the trial court.
4. **Criminal Law: Statutes.** Although penal statutes are strictly construed, they are given a sensible construction in the context of the object sought to be accomplished, the evils and mischiefs sought to be remedied, and the purpose sought to be served.
5. **Statutes.** A court must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless.
6. **Statutes: Appeal and Error.** If the language of a statute is clear, the words of such statute are the end of any judicial inquiry regarding its meaning.
7. **Controlled Substances: Statutes.** The "personal use exception" in Neb. Rev. Stat. § 28-401(14) (Cum. Supp. 2004) only applies to "preparation" and "compounding," but does not apply to the "production" of a controlled substance, even if that production is for personal use.
8. **Search Warrants: Affidavits: Probable Cause: Proof: Time.** A search warrant, to be valid, must be supported by an affidavit which establishes probable cause. Probable cause sufficient to justify issuance of a search warrant means a fair probability that contraband or evidence of a crime will be found. Proof of probable cause justifying the issuance of a search warrant generally must consist of facts so closely related to the time of issuance of the warrant as to justify a finding of probable cause at that time.
9. **Search Warrants: Affidavits: Probable Cause: Appeal and Error.** In reviewing the strength of an affidavit submitted as a basis for finding probable cause to issue a search warrant, an appellate court applies a "totality of the circumstances" test. The question is whether, under the totality of the circumstances illustrated by the affidavit, the issuing magistrate had a substantial basis for finding that the affidavit established probable cause.
10. **Search Warrants: Probable Cause: Appeal and Error.** A magistrate's determination of probable cause to issue a search warrant should be paid great deference by reviewing courts.
11. **Search Warrants: Affidavits: Appeal and Error.** After-the-fact scrutiny by courts of the sufficiency of an affidavit used to obtain a search warrant should not take the form of a de novo review.

Appeal from the District Court for Pierce County: PATRICK G. ROGERS, Judge. Affirmed.

Kate M. Jorgensen and, on brief, Andrew D. Weeks, of Stratton & Kube, P.C., for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

GERRARD, J.

Darren L. Bossow was convicted in a jury trial of possession of a controlled substance with intent to manufacture.[1] Bossow appeals, primarily arguing that the district court failed to properly instruct the jury with regard to the "personal use exception" in Neb. Rev. Stat. § 28-401(14) (Cum. Supp. 2004). Bossow also asserts that the court erred in denying his motion to suppress evidence obtained from a search of his residence and statements he made to law enforcement officials, and for overruling his motion to reopen his case. For the reasons that follow, we affirm the judgment of the district court.

STATEMENT OF FACTS

ACQUIRING SEARCH WARRANT

On April 20, 2006, Sandra Tighe, an investigator with the Nebraska State Patrol, prepared an affidavit for the purpose of securing a search warrant to search "the person of Darren L. Bossow," his two vehicles, and his residence. The first section in Tighe's affidavit contained background information describing her training and experience with the Nebraska State Patrol. This section also included general information relating to marijuana plants—specifically, that marijuana plants "can take up to 22 weeks to mature," "can grow in excess of eight (8) feet tall[,] and can produce up to one (1) pound of illegal usable plant material at the time of harvest." Tighe's affidavit further explained that based on her "training and experience," she knew that "individuals involved in the manufacture or growing of marijuana" may have in their possession, among other things, "firearms and ammunition"; "large amounts of cash . . . from the sales of the marijuana"; and "marijuana, packaging materials, processing articles, [or] articles of horticulture . . . on their person(s)."

In the second section of Tighe's affidavit, she explained that she had received a written report from another police officer, who had interviewed Ryan Lindstrom and B.J. Richtig. Lindstrom had informed the officer that on March 18, 2006, he and Richtig had been in Bossow's residence and had seen

[1] Neb. Rev. Stat. § 28-416(2)(b) (Cum. Supp. 2006).

"a four foot tall marijuana plant and approximately five smaller three inch marijuana plants under a heat lamp in the living room area by the entertainment center." Lindstrom had stated that "all of the plants were potted and well taken care of" and that the larger marijuana plant was in the "'skunk'" stage of the growing process.

Tighe's affidavit stated that on April 3, 2006, Lindstrom, Richtig, and a third person had gone to Bossow's residence, but that Bossow had not been present. Lindstrom had, however, spoken to Bossow's son, who had told Lindstrom that the marijuana plants had been moved to Bossow's bedroom closet. Lindstrom had not seen the marijuana plants on April 3, but the house had a "strong nasty odor of marijuana on the inside while he was present."

Tighe also averred that on April 3, 2006, the police officer had interviewed Richtig and Colin Zuhlke. Richtig confirmed to the officer that he had gone with Lindstrom to Bossow's residence on March 18 and had seen the marijuana plants under a heat lamp in the living room. Richtig had described one of the plants as being 4 feet tall. Zuhlke had told the officer that he had been in Bossow's residence on March 19 and seen "four or five large marijuana plants in the living room between the entertainment center and the wall." Zuhlke had said that the plants were approximately 4 feet tall, potted like houseplants, and under lights. Tighe's affidavit also noted that she had interviewed Zuhlke on April 20, and he had confirmed seeing the marijuana plants in Bossow's residence on March 19.

Tighe's affidavit further stated that Bossow had previously been arrested and that on April 20, 2006, she had reviewed Bossow's Pierce County sheriff's office medical screening form, which had been filled out on April 2. In this form, Bossow had volunteered information that he used marijuana "occasionally and last used marijuana the previous day, April 1, 2006." The remaining sections of Tighe's affidavit provided, among other things, a description of Bossow's physical characteristics, the location of his residence, and a description of Bossow's vehicles.

Based on Tighe's affidavit, the district court issued a warrant to search "[t]he person of Darren Lee Bossow," his vehicles, and his residence.

Detaining and Questioning Bossow

On April 21, 2006, in anticipation of executing the search warrant on Bossow's residence, the police officers who were to be involved in the search held a briefing. While the officers were conducting the briefing, an investigator, who was doing surveillance on Bossow's residence, called an officer at the briefing and said that Bossow was leaving his residence. As a result, Trooper Jason Sears was instructed to leave the briefing and detain Bossow until the search warrant had been executed.

Sears saw Bossow's car pull into the parking lot of a gas station and watched Bossow leave his car and enter the gas station. Sears testified that before following Bossow into the building, he noticed that Bossow's car had a cover around the outside of the license plate, such that Sears could not determine whether the car was currently registered. Sears entered the building and informed Bossow that he wanted to talk to Bossow outside, about his license plate. Once outside the building, Bossow identified himself to Sears as "Darren Bossow." But, when Sears asked for a driver's license or other proof of identity, Bossow was unable to produce any. It was later determined that Bossow's driver's license had been suspended.

Sears informed Bossow that he was going to take Bossow to the sheriff's office to "clear up the registration and his identity" and because there was an investigator at the sheriff's office who wanted to speak to Bossow. On cross-examination, Sears testified that the purposes for "[d]etaining" Bossow were first, to detain him "for the search warrant" and, second, because Bossow "didn't have identification and [Sears] wanted to be sure that was him for sure."

Sears handcuffed Bossow, placed Bossow in his police car, and began driving to the sheriff's office. While driving from the gas station to the sheriff's office, Sears advised Bossow of his *Miranda* rights.[2] When they arrived at the sheriff's office, Tighe approached Sears' police car and, while Bossow was still seated in the back of the car, gave Bossow a copy of the search

[2] See *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

warrant. Tighe testified that after Bossow read the search warrant, Bossow admitted there was a marijuana plant in his house in an upstairs bedroom closet.

Sears took Bossow into the sheriff's office while Tighe and another officer remained outside and searched Bossow's car, which had been brought to the sheriff's office. The officers did not find any drugs or drug paraphernalia in Bossow's car. Following the search of Bossow's car, Tighe returned to the sheriff's office and again advised Bossow of his *Miranda* rights, after which Bossow signed a waiver of rights form.

Tighe testified that after reading Bossow his *Miranda* rights, she questioned him about the marijuana plants in his house. Tighe testified that Bossow told her that he had taken approximately eight marijuana seeds from marijuana that he had purchased and had planted those seeds in a ceramic pot. Bossow further explained that he watered the plants and placed them under a heat lamp to help them grow. On cross-examination, Tighe stated that Bossow told her that he "occasionally" used marijuana and that the marijuana plant was "an experiment" and was for his personal use.

Execution of Search Warrant

On April 21, 2006, shortly after Bossow left his residence, police officers executed the search warrant at Bossow's residence. In Bossow's upstairs bedroom closet, police found a ceramic pot containing four marijuana plants, a heat lamp, and a water spray bottle. The marijuana plants had grown to be 3 to 4 feet in height. In other areas of the house, police also found two triple-beam scales and a marijuana pipe.

A police officer who assisted in the search testified that the marijuana plants had a "viable root system" and would "develop and if nurtured or cultivated [would] produce a product." The officer further testified that these plants were not "mature plants," nor were they "robust for this stage" of development. The officer stated that the plants were "about average" and that he had seen worse.

Motion to Suppress

The State filed an information charging Bossow with possession of a controlled substance with intent to manufacture,

pursuant to § 28-416(2)(b). Bossow subsequently filed a motion to suppress all of the evidence seized as a result of the search, and all statements made to law enforcement on April 21, 2006. In support of his motion to suppress, Bossow argued that the search warrant was issued on the basis of an affidavit that failed to establish probable cause because the affidavit contained stale evidence. Bossow also argued that Sears did not have probable cause to detain him on April 21 and that as a result, the incriminating statements he made to law enforcement were not admissible.

Following a hearing, the district court overruled Bossow's motion to suppress. As to the incriminating statements, the court determined that "[i]t does not matter what the officer thought at the time he detained [Bossow]. The fact is that at that time the officer clearly had probable cause to arrest [Bossow] for operating a motor vehicle while his license was suspended." The court determined that Bossow's statements were admissible, based on this probable cause and the facts that Bossow was given his *Miranda* rights while being taken to the sheriff's office and again after arriving at the sheriff's office. The court further determined that the evidence presented in the affidavit was not stale and that as a result, there was probable cause supporting the magistrate's decision to issue the search warrant.

Jury Instruction

A jury trial was conducted, and during trial, Bossow preserved the issues raised in his motion to suppress by making timely objections to the offered evidence. After the State had rested its case, Bossow moved for a directed verdict, citing *State v. Wyatt*[3] and the statutory exception in § 28-401(14) providing that "manufactur[ing] shall not include the preparation or compounding of a controlled substance . . . for [one's] own use." Bossow argued that the evidence at trial established that he qualified for the "personal use exception" in § 28-401(14). Specifically, Bossow pointed to Tighe's testimony on cross-examination that Bossow told her the marijuana plants were for

[3] *State v. Wyatt*, 6 Neb. App. 586, 575 N.W.2d 411 (1998), *overruled on other grounds, State v. Davidson*, 260 Neb. 417, 618 N.W.2d 418 (2000).

his own personal use. The court overruled Bossow's motion for a directed verdict, finding that the State had produced sufficient evidence for the jury to deliberate on the charge of possession of a controlled substance with the intent to manufacture. Bossow rested his case.

The court then conducted a jury instruction conference. During the conference, Bossow moved to reopen his case in order to introduce a "lab report [that] has the weight of the marijuana" and "to allow [Bossow] . . . to testify in lieu of the court's interpretation of State v. Wyatt, about what is required as far as [Bossow's] burden or proof" relating to the "personal use exception." The State responded that it had anticipated that Bossow would testify, but when the defense rested, the State released its rebuttal witnesses. The court denied Bossow's motion to reopen his case.

Bossow also objected to jury instruction No. 6, which set forth the definitions of "manufacture" and "production" as defined in § 28-401(14) and (21). Jury instruction No. 6 stated, in relevant part:

> "Manufacture" shall mean the production, preparation, propagation, compounding, or processing of a controlled substance, either directly or indirectly by extraction from substances of natural origin, independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis, and shall include any packaging . . . of the substance or labeling or relabeling of its container, except that manufacture shall not include the preparation or compounding of a controlled substance by an individual for his or her own use.
>
> "Production" shall include the manufacture, planting, cultivation, or harvesting of a controlled substance.

In addition to jury instruction No. 6, Bossow requested that the jury be given an instruction stating that "[if] you find by the greater weight of the evidence that the defendant prepared of [sic] compounded marijuana for his own use, you must find the defendant not guilty of possession of marijuana with intent to manufacture." The court overruled Bossow's objection and denied his requested instruction.

The jury found Bossow guilty of possession of a controlled substance with intent to manufacture, and the court convicted Bossow pursuant to that verdict. Bossow appeals.

ASSIGNMENT OF ERROR

Bossow assigns that the district court erred in (1) refusing to instruct the jury on his burden of proof for the statutory "personal use exception," (2) overruling his motion for a directed verdict, (3) overruling his motion to suppress the evidence seized as a result of the search warrant, (4) overruling his motion to suppress the statements he made to law enforcement, and (5) overruling his motion to reopen his case.

STANDARD OF REVIEW

[1] Statutory interpretation presents a question of law, and an appellate court resolves such issues independently of the lower court's conclusions.[4]

[2] A trial court's ruling on a motion to suppress, based on a claim of insufficiency of the affidavit supporting issuance of a search warrant, will be upheld unless its findings are clearly erroneous. In making this determination, an appellate court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and considers it observed the witnesses.[5]

[3] In criminal prosecutions, the withdrawal of a rest in a trial on the merits is within the discretion of the trial court.[6]

ANALYSIS

"Personal Use Exception" in § 28-401(14) Does Not Apply to "Production" of Controlled Substance

Bossow was convicted of possession of a controlled substance with the intent to manufacture—specifically, production of marijuana. Section 28-401(14) defines "manufacture," in relevant part, as follows:

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[4] *State v. McKinney*, 273 Neb. 346, 730 N.W.2d 74 (2007).

[5] *State v. Ball*, 271 Neb. 140, 710 N.W.2d 592 (2006).

[6] *State v. Thomas*, 236 Neb. 84, 459 N.W.2d 204 (1990), *disapproved on other grounds, State v. Boslau*, 258 Neb. 39, 601 N.W.2d 769 (1999).

> Manufacture shall mean the production, preparation, propagation, compounding, conversion, or processing of a controlled substance, either directly or indirectly, by extraction from substances of natural origin, independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis . . . . *Manufacture shall not include the preparation or compounding of a controlled substance by an individual for his or her own use* . . . . [(Emphasis supplied.)]

"Production" is defined in § 28-401(21) as including "the manufacture, planting, cultivation, or harvesting of a controlled substance."

Bossow argues that the district court erred in not instructing the jury on the burden of proof Bossow was required to meet in order for the statutory "personal use exception" to apply. The State contends, and we agree, that the "personal use exception" is not available to Bossow because Bossow was charged with the "production" of marijuana, and pursuant to the plain language of § 28-401(14), the "production" of marijuana is not included within the "personal use exception." Our analysis in this regard is guided by well-established principles of statutory interpretation.

[4-6] Although penal statutes are strictly construed, they are given a sensible construction in the context of the object sought to be accomplished, the evils and mischiefs sought to be remedied, and the purpose sought to be served.[7] A court must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless.[8] If the language of a statute is clear, the words of such statute are the end of any judicial inquiry regarding its meaning.[9]

In defining the term "manufacture," § 28-401(14) uses six specific terms to describe what types of activity are proscribed. But of those six terms, only two are excluded from the definition

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[7] *State v. Aguilar*, 268 Neb. 411, 683 N.W.2d 349 (2004).

[8] *State v. Wester*, 269 Neb. 295, 691 N.W.2d 536 (2005).

[9] *State v. Warriner*, 267 Neb. 424, 675 N.W.2d 112 (2004).

of "manufacture" through application of the "personal use exception"—specifically, "preparation" and "compounding" of a controlled substance. We find it significant that the Legislature expressly limited the "personal use exception" to only two of the specified types of "manufacture" and did not include "production," which is the only accurate description of the conduct in which Bossow was alleged to have engaged.

The suggestion that growing marijuana is encompassed within the terms "preparation" or "compounding" of a controlled substance, as urged by Bossow, fails to recognize that "planting, cultivat[ing], or harvesting" a controlled substance is already clearly included within the definition of "production," as opposed to "preparation" or "compounding." In short, the production of marijuana is plainly prohibited. Had the Legislature intended to include within the "personal use exception" all of the activities included within the definition of "manufacture," it could have easily done so. The plain meaning of the "personal use exception" is to avoid finding an individual liable for the felony of manufacturing a controlled substance when that individual is already in possession of the controlled substance and is simply making it ready for use, such as rolling marijuana into cigarettes for smoking or combining it with other ingredients for use.[10] Given the plain language of the statute, it is evident that the Legislature intended to limit the application of the exception to only the "preparation" or "compounding" of a controlled substance.

Bossow contends that the "personal use exception" is applicable to this case, citing *Wyatt*,[11] a decision of the Nebraska Court of Appeals. In *Wyatt*, police officers, pursuant to a search warrant, searched David Wyatt's residence and found, among other things, a healthy marijuana plant growing in a bucket, marijuana seeds, and paraphernalia. Wyatt was charged with manufacturing a controlled substance, to wit, marijuana.

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[10] *State v. Childers*, 41 N.C. App. 729, 255 S.E.2d 654 (1979). See, also, *Stone v. State*, 348 Ark. 661, 74 S.W.3d 591 (2002); *State v. Underwood*, 168 W. Va. 52, 281 S.E.2d 491 (1981); *People v Pearson*, 157 Mich. App. 68, 403 N.W.2d 498 (1987); *State v. Netzer*, 579 S.W.2d 170 (Mo. App. 1979).

[11] *State v. Wyatt, supra* note 3.

At trial, Wyatt argued that his conduct fell within the statutorily mandated "personal use exception" in § 28-401(14). Wyatt claimed that the State did not prove beyond a reasonable doubt that he violated the manufacture element of the statute because there was no evidence that the marijuana found in his residence was used for anything other than his own personal use. The Court of Appeals concluded that the burden was on Wyatt to prove that he fell within the "personal use exception,"[12] but he had failed to "offer any evidence to show that he was preparing or compounding the marijuana for his own personal use."[13] Accordingly, Wyatt's conviction for manufacturing marijuana was affirmed.

[7] But contrary to Bossow's argument, the issue in *Wyatt* was simply whether the defendant was required to prove that the marijuana was intended for his own "personal use." Whether the marijuana was being "produced," as opposed to "prepared" or "compounded," was not at issue. In short, *Wyatt* does not support Bossow's argument, which is without merit. We hold that the "personal use exception" in § 28-401(14) only applies to "preparation" and "compounding," but does not apply to the "production" of a controlled substance, even if that production is for personal use. Accordingly, because the "personal use exception" was not available to Bossow, the district court did not err in refusing to instruct the jury as Bossow had requested.

Bossow's second assignment of error is that the district court erred in overruling his request for a directed verdict based on his claim that he met the "personal use exception" to manufacturing. For the reasons stated, this assignment of error is also without merit.

Information in Affidavit Was Sufficiently Related in Time to Issuance of Warrant to Justify Finding of Probable Cause

[8,9] Next, Bossow argues that the district court erred in overruling his motion to suppress because the affidavit supporting the search warrant contained stale evidence and therefore did not establish probable cause. A search warrant, to be valid,

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[12] See *State v. Taylor*, 221 Neb. 114, 375 N.W.2d 610 (1985).

[13] *State v. Wyatt, supra* note 3, 6 Neb. App. at 597, 575 N.W.2d at 419.

must be supported by an affidavit which establishes probable cause. Probable cause sufficient to justify issuance of a search warrant means a fair probability that contraband or evidence of a crime will be found. Proof of probable cause justifying the issuance of a search warrant generally must consist of facts so closely related to the time of issuance of the warrant as to justify a finding of probable cause at that time.[14] In reviewing the strength of an affidavit submitted as a basis for finding probable cause to issue a search warrant, an appellate court applies a "totality of the circumstances" test. The question is whether, under the totality of the circumstances illustrated by the affidavit, the issuing magistrate had a substantial basis for finding that the affidavit established probable cause.[15]

In arguing that the information in the affidavit was stale, Bossow points to the fact that pursuant to the affidavit, the last time the marijuana plants in Bossow's residence had actually been seen was March 19, 2006, but the search warrant was not issued until April 20, approximately 1 month later. We explained in *State v. Faber*[16] that

> "'[t]here is no bright-line test for determining when information is stale. Whether the averments in an affidavit are sufficiently timely to establish probable cause depends on the particular circumstances of the case, and the vitality of probable cause cannot be quantified by simply counting the number of days between the occurrence of the facts supplied and the issuance of the affidavit. Time factors must be examined in the context of a specific case and the nature of the crime under investigation.' . . ."

We further stated that, where the affidavit recites a mere isolated violation, it would not be unreasonable to imply that probable cause dwindles rather quickly with the passage of time. However, where the affidavit properly recites facts indicating

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[14] *State v. Ildefonso*, 262 Neb. 672, 634 N.W.2d 252 (2001).

[15] *State v. Lammers*, 267 Neb. 679, 676 N.W.2d 716 (2004).

[16] *State v. Faber*, 264 Neb. 198, 213-14, 647 N.W.2d 67, 82 (2002).

activity of a protracted and continuous nature—a course of conduct—the passage of time becomes less significant.[17]

In the present case, notwithstanding the passage of time between the information in the affidavit and the issuance of the warrant, we find that the information in the affidavit was not too stale to establish probable cause. The information in the affidavit establishes that three separate individuals saw marijuana plants growing under a heat lamp in Bossow's residence approximately 1 month before the issuance of the search warrant.

The delay between the evidence collected in the affidavit and the issuance of the warrant is not significant when considered in light of the nature of the crime with which Bossow was charged. Growing marijuana is not an isolated activity where the evidence supporting probable cause tends to disappear quickly. Rather, growing marijuana is a protracted process, for which there is a much greater probability that the evidence related to the crime would remain on the premises for some time. As indicated in Tighe's affidavit, marijuana plants can take up to 22 weeks to mature and can grow in excess of 8 feet tall.

But here, the largest marijuana plant described in the affidavit was approximately 4 feet tall, and the other marijuana plants in Bossow's residence were much smaller than that. This information indicates that the plants were, at that time, in the early stages of development and unlikely to be harvested in the near future or removed from Bossow's residence. Given the particular circumstances of this case, we conclude that the passage of time was not fatal to the court's finding of probable cause.

[10,11] A magistrate's determination of probable cause to issue a search warrant should be paid great deference by reviewing courts.[18] After-the-fact scrutiny by courts of the sufficiency of an affidavit used to obtain a search warrant should not take the form of a de novo review.[19] In this case, the facts justifying the issuance of the warrant were sufficiently related

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[17] *Id.*

[18] *State v. Detweiler*, 249 Neb. 485, 544 N.W.2d 83 (1996).

[19] *Id.*

to the time of the issuance of the warrant to justify the district court's finding of probable cause.

Bossow's Detention Was Not Unreasonable Seizure and Statements He Made to Law Enforcement Are Admissible

In a related argument, Bossow claims that the information provided in the affidavit did not establish probable cause to search his person and that therefore, his detention was an unreasonable seizure, and the incriminating statements he made to law enforcement after he was detained should be suppressed. We disagree. When the evidence in the affidavit and the circumstances surrounding Bossow's detention are considered collectively, we find that Bossow's detention was not an unreasonable seizure.

As discussed above, the information in the affidavit was sufficient to establish probable cause to believe that Bossow was engaged in criminal activity—specifically, the manufacture of marijuana. And in particular, Tighe averred that individuals involved in the manufacture of marijuana may have evidence on their person, such as marijuana itself; large amounts of cash; weapons; or materials used for the production, processing, or packaging. Contrary to Bossow's argument, the affidavit established probable cause for the search of Bossow's residence and his person.

Nor did police act unreasonably in taking Bossow into custody and transporting him to the police station. A valid warrant to search Bossow had already issued. When contacted by police, Bossow was unable to produce identification and had been seen by police unlawfully operating a vehicle without a driver's license.[20] When considered collectively, the search warrant, the need to positively identify Bossow in connection with the search, and Bossow's unlawful behavior are sufficient to establish that seizing Bossow was reasonable.

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[20] See Neb. Rev. Stat. §§ 60-489 (Cum. Supp. 2006) and 60-4,111 (Reissue 1995).

District Court Did Not Abuse Its Discretion in Overruling Bossow's Request to Reopen His Case

Finally, Bossow claims that the district court erred in overruling his motion to reopen his case and allow him to testify regarding the burden of proof for the "personal use exception." The withdrawal of a rest in a trial on the merits is within the discretion of the trial court.[21] As already discussed, the "personal use exception" was not available to Bossow. Nor did Bossow, in support of his motion, claim that he intended to proffer evidence that would change that conclusion. Instead, Bossow's motion was premised on his intent to proffer evidence relevant only to the misunderstanding of the "personal use exception" that the district court had correctly rejected. Thus, the district court did not abuse its discretion in refusing Bossow's request to reopen his case to present evidence relating to this exception. Bossow's final assignment of error is without merit.

CONCLUSION

For the foregoing reasons, we find no merit to Bossow's assignments of error and affirm the judgment of the district court.

Affirmed.

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[21] *State v. Thomas, supra* note 6.

State of Nebraska ex rel. Counsel for Discipline of the Nebraska Supreme Court, relator, v. Carol Pinard-Cronin, respondent.

743 N.W.2d 649

Filed January 18, 2008. No. S-07-275.

Original action. Judgment of public reprimand.

Heavican, C.J., Wright, Connolly, Gerrard, Stephan, McCormack, and Miller-Lerman, JJ.

Per Curiam.

INTRODUCTION

On March 16, 2007, formal charges were filed by the office of the Counsel for Discipline, relator, against Carol Pinard-Cronin,

respondent. The formal charges set forth two counts that included allegations that respondent violated the following provisions of the Code of Professional Responsibility: Canon 1, DR 1-102(A)(5) (engaging in conduct prejudicial to administration of justice); Canon 6, DR 6-101(A)(1) (handling matter not competent to handle); DR 6-101(A)(2) (inadequately preparing to handle legal matter); and DR 6-101(A)(3) (neglecting legal matter); as well as the following provisions of Neb. Ct. R. of Prof. Cond. (rev. 2005): rule 1.1 (providing competent representation to client), rule 1.3 (acting with diligence in representing client), rule 8.4(a) (violating disciplinary rules), and rule 8.4(d) (engaging in conduct prejudicial to administration of justice). The formal charges also alleged that respondent violated her oath of office as an attorney. Neb. Rev. Stat. § 7-104 (Reissue 1997). Respondent's answer in effect disputed certain of the allegations.

A referee was appointed who heard evidence. The referee filed a report on September 24, 2007. With respect to the formal charges, the referee concluded that respondent's conduct had violated DR 1-102(A)(5); DR 6-101(A)(1) through (3); rules 1.1, 1.3, and 8.4(a) and (d); and her oath as an attorney. The referee recommended that respondent receive a public reprimand and be placed on probation for a period of 18 months, during which time respondent would engage and work with a practicing attorney to monitor respondent's practice.

On October 26, 2007, relator filed a motion for judgment on the pleadings, requesting that this court accept the referee's recommendation and enter judgment thereon. The motion was not opposed. We grant relator's motion, and we impose discipline as indicated below.

FACTS

The referee's hearing was held on September 17, 2007. Respondent testified during the hearing. A total of 16 exhibits were admitted into evidence.

The substance of the referee's findings may be summarized as follows: Respondent was admitted to the practice of law in the State of Nebraska in 2001. She has practiced in Douglas County, Nebraska.

With regard to count I of the formal charges, the referee found that on April 11, 2003, respondent was retained by Rex Moulton to represent him in a personal injury claim arising from an automobile accident. Respondent's practice essentially focuses on the areas of juvenile and family law, and Moulton's case was the first and only personal injury matter respondent has handled. On November 15, 2004, respondent filed suit on behalf of Moulton against Christine Roe in the district court for Douglas County. Respondent attempted to serve Roe but failed to serve Roe within 6 months of the filing of the lawsuit. On May 17, 2005, Moulton's lawsuit against Roe was dismissed by the district court, by which time the statute of limitations on Moulton's claim had run. The referee found that respondent failed to respond to telephone calls from Moulton regarding the status of his case, failed to inform him that his lawsuit had been dismissed, and failed to protect Moulton's claim from being lost due to the running of the statute of limitations.

With regard to count I, the referee found that in April 2006, Moulton filed a grievance with relator regarding respondent's handling of his personal injury case. A copy of Moulton's grievance letter was sent to respondent by relator with directions to respond in writing to the grievance. Respondent failed to respond. Respondent failed to answer two subsequent letters sent by relator directing respondent to respond to Moulton's grievance letter. After receiving a fourth request to respond to Moulton's grievance, respondent provided a response and effectively acknowledged that she had filed suit on behalf of Moulton and that the suit had been dismissed and was barred by the statute of limitations. Moulton subsequently brought a malpractice action against respondent, which respondent settled by paying $2,500.

With regard to count II of the formal charges, the referee found that on October 10, 2006, respondent's trust account check in the amount of $200 was presented to respondent's bank. At the time, respondent's trust account balance was $110.22. The bank honored the check and charged respondent a service fee, causing respondent's trust account to be overdrawn by a total of $120.78. On October 11, respondent's trust account checks in the amounts of $82 and $34 were presented to respondent's

bank. The bank honored the checks and charged respondent additional service fees, which caused respondent's trust account to be overdrawn by a total of $298.78. The bank sent relator a notice of respondent's trust account overdrafts. On October 24, relator wrote respondent and asked her to provide a written explanation as to why her trust account did not have sufficient funds to honor checks presented against it. Respondent was also asked to provide copies of all supporting documentation.

With regard to count II, the referee found that on October 26 and again on November 1, 2006, relator received additional notices from respondent's bank indicating that respondent's trust account was again overdrawn. On October 26 and again on November 1, relator wrote respondent and asked her to provide a written explanation as to why her trust account did not have sufficient funds to honor checks presented against it. Respondent was also asked to provide copies of all supporting documentation. On November 14, respondent sent relator a letter by facsimile transmission stating that the overdrafts were caused by two clients' checks that had been subsequently dishonored by their respective banks. Respondent stated in her letter that copies of her supporting documentation would be sent by regular mail. On December 28, after relator had not received respondent's supporting documentation, relator wrote respondent and asked her to provide that documentation as well as copies of certain checks and respondent's trust account bank statements for the period of August through November 2006. Respondent did not provide relator the supporting documentation or the requested copies.

With regard to the October and November 2006 overdrafts in respondent's trust account, the referee found that such overdrafts occurred when checks from two of respondent's clients were dishonored. The referee found that respondent's overdraft situation was "a fleeting, isolated, one time situation, which had never occurred before, and has not occurred since." The referee further found that the overdraft situation was not the result of either respondent's misappropriation of client funds or willful negligence. The referee found that no client was harmed by the overdraft situation and that respondent had taken immediate steps to rectify the overdraft situation.

Finally, the referee found that during the fall and winter of 2005 and 2006, respondent was encountering several "personal challenges." Two of respondent's children had sustained serious injuries in separate accidents, respondent's mother had suffered a stroke, and three members of respondent's family had died, one by suicide. The referee found that at the time of the hearing, respondent was seeing a mental health counselor. The referee also found that if respondent was allowed to continue in the practice of law, she intended to limit her practice to the areas of juvenile and family law.

The referee found that among the exhibits admitted into evidence were 14 letters written by juvenile court judges, lawyers, and others, all "express[ing] a high regard for [respondent's] skills as a juvenile law practitioner." Also included in the exhibits was a letter from respondent's mental health counselor to the effect that respondent was making progress in her counseling and setting realistic goals to avoid a reoccurrence of the situation that had resulted in the present disciplinary proceedings.

Based upon the evidence offered during the hearing, the referee found that certain of respondent's actions constituted a violation of the following provisions of the Code of Professional Responsibility: DR 1-102(A)(5) and DR 6-101(A)(1) through (3). The referee also found that certain of respondent's actions violated rules 1.1, 1.3, and 8.4(a) and (d) of the Nebraska Rules of Professional Conduct. Finally, the referee found that respondent's actions constituted a violation of respondent's oath of office as an attorney. With respect to the discipline to be imposed, the referee recommended that respondent receive a public reprimand and be placed on probation for a period of 18 months, during which time, respondent would engage and work with a practicing attorney to monitor respondent's practice.

No exceptions were filed to the referee's report. On October 26, 2007, relator filed a motion for judgment on the pleadings, in which relator moved this court to enter judgment in conformity with the referee's report and recommendation.

ANALYSIS

We note that certain of respondent's conduct at issue in this case occurred prior to the September 1, 2005, effective date

of the Nebraska Rules of Professional Conduct and is, therefore, governed by the now-superseded Code of Professional Responsibility. We also note that certain of respondent's conduct at issue in this case occurred on or after September 1, 2005, and is therefore governed by the Nebraska Rules of Professional Conduct. We are nonetheless guided by the principles previously announced in our prior decisions under the Code of Professional Responsibility. See *State ex rel. Counsel for Dis. v. Dortch*, 273 Neb. 667, 731 N.W.2d 594 (2007).

A proceeding to discipline an attorney is a trial de novo on the record. *State ex rel. Counsel for Dis. v. Petersen*, 272 Neb. 975, 725 N.W.2d 845 (2007). To sustain a charge in a disciplinary proceeding against an attorney, a charge must be supported by clear and convincing evidence. *Id.* Violation of a disciplinary rule concerning the practice of law is a ground for discipline. *Id.*

As noted above, neither party filed written exceptions to the referee's report. Pursuant to Neb. Ct. R. of Discipline 10(L) (rev. 2005), relator filed a motion for judgment on the pleadings. When no exceptions to the referee's findings of fact are filed by either party in an attorney discipline proceeding, the Nebraska Supreme Court may, in its discretion, consider the referee's findings final and conclusive. *State ex rel. Counsel for Dis. v. Wickenkamp*, 272 Neb. 889, 725 N.W.2d 811 (2007). Based upon the undisputed findings of fact in the referee's report, which we consider to be final and conclusive, we conclude the formal charges are supported by clear and convincing evidence, and the motion for judgment on the pleadings is granted. Specifically, based upon the foregoing evidence, we conclude that by virtue of respondent's conduct occurring before September 1, 2005, respondent has violated the following provisions of the Code of Professional Responsibility: DR 1-102(A)(5) and DR 6-101(A)(1) through (3). We also conclude that by virtue of respondent's conduct occurring on or after September 1, 2005, respondent has violated the following provisions of the Nebraska Rules of Professional Conduct: rules 1.1, 1.3, and 8.4(a) and (d). Finally, we conclude that by virtue of respondent's conduct, respondent has violated her oath of office as an attorney, § 7-104.

We have stated that the basic issues in a disciplinary proceeding against a lawyer are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances. *State ex rel. Counsel for Dis. v. Dortch, supra*. Neb. Ct. R. of Discipline 4 (rev. 2004) provides that the following may be considered as discipline for attorney misconduct:

> (A) Misconduct shall be grounds for:
> (1) Disbarment by the Court; or
> (2) Suspension by the Court; or
> (3) Probation by the Court in lieu of or subsequent to suspension, on such terms as the Court may designate; or
> (4) Censure and reprimand by the Court; or
> (5) Temporary suspension by the Court; or
> (6) Private reprimand by the Committee on Inquiry or Disciplinary Review Board.
> (B) The Court may, in its discretion, impose one or more of the disciplinary sanctions set forth above.

See, also, rule 10(N).

With respect to the imposition of attorney discipline in an individual case, we have stated that each attorney discipline case must be evaluated individually in light of its particular facts and circumstances. *State ex rel. Counsel for Dis. v. Wickenkamp, supra*. For purposes of determining the proper discipline of an attorney, this court considers the attorney's acts both underlying the events of the case and throughout the proceeding. *Id*. The determination of an appropriate penalty to be imposed on an attorney in a disciplinary proceeding also requires the consideration of any aggravating or mitigating factors. *Id*.

We have considered the referee's report and recommendation, the findings of which have been established by clear and convincing evidence, and the applicable law. Upon due consideration of the record, the court finds that respondent should be and hereby is publicly reprimanded. Further, the court finds that respondent shall be on probation for a period of 18 months, during which period respondent will:

(1) be monitored by an attorney approved by relator;

(2) provide the monitoring attorney, on a monthly basis, with a list of all cases for which respondent is then currently responsible, said list to include the following information for each case:

(a) the date the attorney/client relationship began;

(b) the type of case;

(c) the last date and type of work completed on the case;

(d) the next type of work and date to be completed on the case; and

(e) any applicable statute of limitations and its date;

(3) meet on a monthly basis with the monitoring attorney to discuss respondent's pending cases; and

(4) work with the monitoring attorney to develop and implement appropriate office procedures to ensure that client matters are handled in a timely manner.

If at any time the monitoring attorney believes respondent has violated a disciplinary rule, or has failed to comply with the terms of probation, the monitoring attorney shall report the same to relator.

Relator shall advise this court within 30 days of the filing of this opinion as to the attorney approved by relator to monitor respondent.

CONCLUSION

Relator's motion for judgment on the pleadings is sustained. We find by clear and convincing evidence that respondent violated DR 1-102(A)(5); DR 6-101(A)(1) through (3); rules 1.1, 1.3, and 8.4(a) and (d); as well as her oath of office as an attorney. It is the judgment of this court that respondent should be and hereby is publicly reprimanded. It is the further judgment of this court that respondent shall be on an 18-month period of monitored probation, subject to the terms set forth above. Respondent is directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 1997), disciplinary rule 10(P), and Neb. Ct. R. of Discipline 23(B) (rev. 2001) within 60 days after an order imposing costs and expenses, if any, is entered by the court.

JUDGMENT OF PUBLIC REPRIMAND.

IN RE INTEREST OF WALTER W., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. MARTINA A., APPELLANT.

744 N.W.2d 55

Filed January 18, 2008. No. S-07-393.

1. **Juvenile Courts: Appeal and Error.** An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings.
2. **Parental Rights: Proof.** To terminate parental rights, the State must prove by clear and convincing evidence that one or more of the statutory grounds listed in Neb. Rev. Stat. § 43-292 (Reissue 2004) have been satisfied and that termination is in the child's best interests.
3. **Indian Child Welfare Act: Parental Rights: Proof.** The Nebraska Indian Child Welfare Act adds two additional elements the State must prove before terminating parental rights in cases involving Indian children: the "active efforts" element and the "serious emotional or physical damage" element.
4. ____: ____: ____. The "active efforts" element under Neb. Rev. Stat. § 43-1505(4) (Reissue 2004) requires proof by clear and convincing evidence in parental rights termination cases.
5. ____: ____: ____. The "active efforts" standard under Neb. Rev. Stat. § 43-1505(4) (Reissue 2004) requires more than the "reasonable efforts" standard that applies in cases involving non-Indian children.
6. **Indian Child Welfare Act: Parental Rights.** To constitute "active efforts" under Neb. Rev. Stat. § 43-1505(4) (Reissue 2004), at least some efforts should be "culturally relevant."
7. ____: ____. The "active efforts" standard under Neb. Rev. Stat. § 43-1505(4) (Reissue 2004) requires a case-by-case analysis.
8. **Indian Child Welfare Act: Parental Rights: Proof: Expert Witnesses.** In an Indian Child Welfare Act case, the State must prove by clear and convincing evidence that terminating parental rights is in the child's best interests; this need not include testimony of a qualified expert witness.
9. **Parental Rights.** When a parent is unable or unwilling to rehabilitate himself or herself within a reasonable time, the child's best interests require termination of parental rights.
10. ____. Children cannot, and should not, be suspended in foster care or be made to await uncertain parental maturity.
11. **Juvenile Courts: Appeal and Error.** A proceeding before a juvenile court is a "special proceeding" for appellate purposes.
12. **Juvenile Courts: Parental Rights: Final Orders: Appeal and Error.** A judicial determination following an adjudication in a special proceeding which affects the substantial right of parents to raise their children is a final, appealable order.

Appeal from the Separate Juvenile Court of Douglas County: ELIZABETH G. CRNKOVICH, Judge. Affirmed.

Marian G. Heaney, of Legal Aid of Nebraska, for appellant.

Regina T. Makaitis, Special Prosecutor, for appellee.

Sarah Helvey and Jennifer A. Carter for amicus curiae Nebraska Appleseed Center for Law in the Public Interest.

Mark C. Tilden, of Native American Rights Fund, and Marian G. Heaney, of Legal Aid of Nebraska, for amici curiae Yankton Sioux Tribe of South Dakota et al.

Shannon Smith, of Indian Child Welfare Law Center, and Padraic I. McCoy and Mandi L. Hill, of Faegre & Benson, L.L.P., for amicus curiae Indian Child Welfare Law Center.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

CONNOLLY, J.

Martina A. appeals the separate juvenile court's order terminating her parental rights to her son, Walter W. He is an Indian child, so the Indian Child Welfare Act (ICWA) applies. The juvenile court initially terminated Martina's parental rights in September 2005. The Nebraska Court of Appeals vacated the termination order in July 2006 because the State had failed to give the Yankton Sioux Tribe proper notice before the termination hearing. After retrial in January and February 2007, the juvenile court again terminated Martina's parental rights. Martina appeals, arguing the State failed to meet its burden under ICWA.

ICWA requires the State to prove that "active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family."[1] The main issues are whether the State (1) must prove the "active efforts" element beyond a reasonable doubt or by clear and convincing evidence and (2) met its burden in proving this element. We affirm because we conclude the State met its burden of proving, by clear and convincing evidence, that the Department of Health

[1] 25 U.S.C. § 1912(d) (2000); Neb. Rev. Stat. § 43-1505(4) (Reissue 2004).

and Human Services (the Department) made active efforts to provide remedial services and rehabilitative programs.

I. PROCEDURAL BACKGROUND

Martina gave birth to Walter on January 2, 2003. The following day, the State filed a supplemental petition. It alleged Martina placed him in a situation injurious to his health or morals. The petition alleged she was unable to provide safe, stable, and independent housing for herself and her child and that her use of alcohol or controlled substances placed Walter at risk for harm. At the time, Martina had five other children who were under the juvenile court's jurisdiction because of Martina's faults or habits. The juvenile court placed Walter in the Department's temporary custody. Evidence later showed that Walter tested positive for amphetamine at birth.

In January 2003, Martina informed the court that she was an enrolled member of the Yankton Sioux Tribe and that Walter's father was an enrolled member of the Omaha Tribe. Later that month, after a continued detention hearing, the court ordered that Walter would remain in the Department's temporary custody. In May, the court found that Martina was an enrolled member of the Yankton Sioux Tribe and that Walter was eligible for enrollment. The court ordered that ICWA and its Nebraska counterpart, the Nebraska Indian Child Welfare Act (NICWA), would apply in all future proceedings. In November, the Yankton Sioux Tribe filed a notice to intervene. According to the parties, the court never heard or granted the tribe's motion.

In April 2004, the court declared Walter a child within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 2002). After a disposition and permanency planning hearing in July, the court ordered that Martina (1) complete an inpatient chemical dependency treatment program, (2) participate in outpatient chemical dependency treatment until admitted for inpatient treatment, (3) maintain safe and adequate housing and a legal source of income, and (4) complete psychological and psychiatric evaluations.

On December 9, 2004, the State moved for termination of Martina's parental rights. The court heard the motion in June 2005 and terminated Martina's parental rights in September.

Martina appealed. The Court of Appeals determined the termination hearing was invalid because the State had failed to give proper notice to the Yankton Sioux Tribe as required under ICWA.[2] The court vacated the termination order and remanded the cause to the juvenile court for further proceedings following proper notice to the Yankton Sioux Tribe.[3]

After receiving the mandate, the juvenile court ordered another hearing on the motion to terminate parental rights. The special prosecutor notified the Yankton Sioux and Omaha Tribes. The court held the hearing on January 31 and February 1, 2007. The Yankton Sioux Tribe did not appear. The court terminated Martina's parental rights in March.

II. ASSIGNMENTS OF ERROR

Martina assigns, restated, that the juvenile court erred in terminating her parental rights because the State failed to meet its burden of proof. In her second assignment of error, Martina asserts that the Court of Appeals' dismissal in an unrelated case precluded her from appealing the adjudication in this case.

III. STANDARD OF REVIEW

[1] We review juvenile cases de novo on the record, and we reach our conclusions independently of the juvenile court's findings.[4]

IV. ANALYSIS

[2,3] To terminate parental rights, the State must prove by clear and convincing evidence that one or more of the statutory grounds listed in Neb. Rev. Stat. § 43-292 (Reissue 2004) have been satisfied and that termination is in the child's best interests.[5] NICWA, however, adds two additional elements the State must prove before terminating parental rights in cases involving Indian children. First, § 43-1505(4) provides an "active efforts" element:

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[2] See *In re Interest of Walter W.*, 14 Neb. App. 891, 719 N.W.2d 304 (2006).

[3] *Id.*

[4] See *In re Interest of Destiny A. et al., ante* p. 713, 742 N.W.2d 758 (2007).

[5] See *In re Interest of Xavier H., ante p.* 331, 740 N.W.2d 13 (2007).

> Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under state law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.

Section 43-1505(4) is identical to its federal counterpart, 25 U.S.C. 1912(d). Second, Nebraska's § 43-1505(6) provides a "serious emotional or physical damage" element:

> No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

Section 43-1505(6) is identical to 25 U.S.C. § 1912(f).

1. The State Met Its Burden of Proving Active Efforts

Martina contends the State failed to prove that the Department made active efforts as required under ICWA.

(a) The "Active Efforts" Element Must Be Proved by Clear and Convincing Evidence

Before deciding whether the State met its burden in proving active efforts, we must first determine the standard of proof for this element. The language in § 43-1505(4) does not impose any particular standard of proof for the active efforts element. Section 43-1505(6), however, expressly requires the State to prove beyond a reasonable doubt that the child is likely to suffer serious emotional or physical harm if the parent retains custody.

Martina contends that the proper standard for the active efforts element is proof beyond a reasonable doubt. The State urges us not to adopt the "beyond a reasonable doubt" standard.

Martina directs our attention to *In re Interest of Phoenix L.*[6] In that case, the mother argued that a Nebraska Juvenile Code

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[6] *In re Interest of Phoenix L.*, 270 Neb. 870, 708 N.W.2d 786 (2006), *disapproved on other grounds, In re Interest of Destiny A. et al., supra* note 4.

section violated equal protection. She argued that the statute only required clear and convincing evidence to terminate parental rights in a case involving non-Indian children but that § 43-1505(6) of NICWA required proof beyond a reasonable doubt. We concluded that "the lower standard of proof under § 43-279.01(3) for the termination of parental rights to non-Indian children, as opposed to the higher standard of proof under the NICWA, does not violate the equal protection rights of parents of non-Indian children."[7] In discussing the "beyond a reasonable doubt" standard, we cited only the "serious emotional and physical damage" element under § 43-1505(6) for terminating parental rights. And we did not mention the active efforts element or its standard of proof; that issue was not before the court. We decline to read *In re Interest of Phoenix L.* as requiring proof beyond a reasonable doubt for all elements of an ICWA case.

Other jurisdictions are split on what standard should apply. For instance, the South Dakota Supreme Court assumed the burden to prove the serious emotional and physical damage element—beyond a reasonable doubt—would apply to prove the active efforts element.[8] Other courts have declined to apply the "beyond a reasonable doubt" standard to the active efforts element.[9] We join this latter group.

[4] Congress did not intend in 25 U.S.C. § 1912 to create a wholesale substitution of state juvenile proceedings for Indian children. Instead, in § 1912, Congress created additional elements that must be satisfied for some actions but did not require a uniform standard of proof for the separate elements. As discussed, Congress imposed a "beyond a reasonable doubt" standard for the "serious emotional or physical damage" element in parental rights termination cases under § 1912(f). Congress also imposed a "clear and convincing" standard of proof for the "serious emotional or physical damage" element

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[7] *Id.* at 884, 708 N.W.2d at 797-98.

[8] *People in Interest of S.R.*, 323 N.W.2d 885 (S.D. 1982).

[9] See, e.g., *Matter of Baby Boy Doe*, 127 Idaho 452, 902 P.2d 477 (1995); *In re M.S.*, 624 N.W.2d 678 (N.D. 2001); *In re Annette P.*, 589 A.2d 924 (Me. 1991).

in foster care placements under § 1912(e). The specified standards of proof in subsections § 1912(e) and (f) illustrate that if Congress had intended to impose a heightened standard of proof for the active efforts element in § 1912(d), it would have done so. Because it did not impose a heightened standard of proof, we decline to interpret § 1912(d)—and its Nebraska counterpart, § 43-1505(4)—as requiring the State to prove active efforts beyond a reasonable doubt. Instead, we conclude that the element requires proof by clear and convincing evidence in parental rights termination cases—the standard required for terminating parental rights under Nebraska law.

(b) The State Produced Sufficient Evidence to Find the Department Made Active Efforts

Martina contends the Department failed to make active efforts to provide remedial services and rehabilitative programs. Section 43-1505(4) is imprecise. The section provides that a party seeking to terminate parental rights to an Indian child "shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family." This language sets out praiseworthy but vague goals for the courts to enforce. It fails to give us guidance in determining whether the Department's efforts were sufficient to meet ICWA's mandates.

[5-7] We do know, however, that the "active efforts" standard requires more than the "reasonable efforts" standard that applies in non-ICWA cases.[10] And at least some efforts should be "culturally relevant."[11] Even with these guidelines, there is no precise formula for "active efforts." Instead, the standard requires a case-by-case analysis.[12]

Martina asserts that the Department's efforts consisted largely of "'encouragement and referrals,'"[13] which she argues did not amount to active efforts.

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[10] See 390 Neb. Admin. Code, ch. 5, § 004.02D (1998).

[11] See *id.*

[12] See *Matter of Baby Boy Doe, supra* note 9.

[13] Brief for appellant at 27.

We begin by noting that the Department was unable to contact Martina from June 2003 until March 2004 because her whereabouts were unknown. It would have been impossible for the Department to provide services during that time.

After the Department regained contact with Martina, it tried to provide remedial services and rehabilitative programs. For instance, the case manager contacted inpatient chemical dependency treatment programs to verify the types of programs and program admittance requirements. The case manager gave Martina information about the programs and encouraged her to apply for programs she had not already considered. The case manager faxed necessary records to the programs at Martina's request. The record reflects that Martina told the case manager she was contacting one program weekly to gain admittance. Yet, when the case manager contacted the program, he was told Martina had not contacted the program in almost 2 months.

The case manager also encouraged Martina to attend an outpatient chemical dependency treatment program and gave her a packet of resources she could contact for outpatient treatment. On at least four occasions, he provided Martina a list of several community resources that could help with job skill development. He also gave Martina packets of community resources to obtain a psychiatric evaluation and referred her to a psychologist for a psychological evaluation.

For housing, the case manager reviewed a list of homeless shelters with Martina in August 2004 after she moved out of an apartment she was sharing with a roommate. He provided a telephone at the state office building so she could secure a bed at a shelter. In September, he gave Martina a letter addressed to the Omaha Housing Authority stating she was in need of housing to comply with her case plan. After Martina told him she intended to apply for assistance through the Omaha Housing Authority, he offered bus tickets for transportation to the Omaha Housing Authority office. Martina stayed at the Siena/Francis House shelter until October, when she was asked to leave the shelter because she was intoxicated. The case manager again reviewed a list of homeless shelters with Martina.

Besides these efforts, the Department provided Martina vouchers for rent, clothing, an electric bill, and drug testing;

bus tickets for transportation to Alcoholics Anonymous and Narcotics Anonymous appointments and to other services; and visitation with Walter, transportation of Walter for visitation, and foster care and medical care for Walter.

Martina points out some areas where the Department's efforts may have fallen short. First, Martina called a Department protection and safety administrator to testify at the second termination trial. When given a series of hypotheticals, this witness provided testimony suggesting that, from a Department policy standpoint, the case manager's efforts in some areas may not have constituted active efforts. Martina also points out that the agency the Department hired to provide visitation services missed or canceled multiple visits during a 5-month period in 2004. She also argues that she had trouble gaining admission to inpatient treatment programs. So, she argues that the case manager should have explored other services throughout Nebraska and Iowa or that he should have returned to the court to seek an amended case plan. And, she argues the Department should have tried to place Walter with relatives and should have created a written cultural plan for him that addressed his specific heritage. Although the case manager did not create a *written* cultural plan, he did discuss a cultural plan with the foster mother. We acknowledge, however, that the Department could have created a plan that better incorporated specific elements of Walter's heritage.

Although the Department could have taken more progressive actions in some of its efforts, we are satisfied that considering the entire record, the Department made active efforts to provide remedial services and rehabilitative programs to prevent the breakup of the Indian family. We conclude the State proved by clear and convincing evidence that the Department made active efforts.

2. The State Met Its Burden in Proving Walter Would Likely Suffer Harm if Returned to Martina

As explained above, § 43-1505(6) requires a "determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent . . . is likely to result in serious

emotional or physical damage to the child." Martina argues that testimony by the State's expert failed to support, beyond a reasonable doubt, a finding that Walter's return to Martina is likely to cause Walter serious emotional or physical damage.

At the disposition hearing in July 2004, Dr. Kevin Cahill, a clinical psychologist, testified about whether the return of Walter to Martina at that time would result in serious emotional or physical damage to Walter. The parties stipulated to Cahill's qualifications as an expert under ICWA. An exhibit at the second termination hearing included his July 2004 testimony.

Cahill identified concerns that could affect Martina's ability to provide competent parenting for Walter. He stated that depression was an ongoing problem for Martina and that depressed parents are at a "very high risk" for neglecting their children.

He also expressed concern because a January 2002 evaluation showed narcissistic traits. He explained that for a narcissistic individual, "the needs of one's self always come first and everything else is secondary." He explained one of the primary minimal competencies an effective parent must have is the ability to "relegate the importance of one's own needs to the primacy of the child's needs."

Cahill further noted that Martina had been identified with an intermittent explosive disorder. He testified that "an individual with an intermittent explosive disorder is likely to simply blow up in rage and anger at intervals, sometimes with very little provocation or in response to a provocation that seems completely out of proportion to the level of response." He explained that such tendencies conflict with another minimal competency for parenting—the ability to withstand the frustrations of parenting without becoming overly reactive.

Cahill also testified at the first trial to terminate Martina's parental rights, and this testimony was included in an exhibit at the second trial. To prepare for the trial, Cahill reviewed a psychological evaluation from another psychologist dated December 2004. He stated the report increased his concerns about Martina's mental health. The other psychologist had made some additional diagnoses that had not previously been made. The other psychologist diagnosed Martina as dependent on methamphetamine, having an impulse control disorder,

possible posttraumatic stress disorder, and a history of bipolar disorder. He also diagnosed her with antisocial personality disorder. Cahill explained that personality disorders are typically lifelong, even though the patient can mitigate the intensity of some symptoms. Later in his testimony, Cahill opined that Martina would not make enough progress to provide permanency for Walter. He also opined that the return of Walter to Martina would result in "serious psychological and potentially physical damage."

On cross-examination, Martina's counsel challenged Cahill's reliance on the December 2004 psychological report because the report contained a test that could be skewed for members of different ethnicities, including Native Americans. For instance, Native Americans typically score higher on the scale that measures antisocial personality disorder. Cahill acknowledged the report did not expressly state that the authoring psychologist used a correction scale or information regarding the Native American population to interpret the results of the test.

Martina now contends that Cahill's testimony failed to show beyond a reasonable doubt that Walter's return to Martina would likely result in serious emotional or physical harm. She argues the testimony failed to support the "beyond a reasonable doubt" standard in part because of Cahill's reliance on the December 2004 report. She also claims the State failed to give Cahill evidence of her negative drug tests. She further claims the State failed to give Cahill a chemical dependency counselor's opinion that she had remained sober between May and August 2004.

After considering Martina's contentions and reviewing the record, including Cahill's testimony, we conclude the State proved beyond a reasonable doubt that returning Walter to Martina is "likely to result in serious emotional or physical damage" to Walter. Setting aside Martina's history of drug use, we note a likelihood that Martina's mental health issues could cause harm to Walter.

3. The State Proved That Terminating Martina's Parental Rights Was in Walter's Best Interests

Martina contends that the State's expert testimony was "insufficient to establish, beyond a reasonable doubt, that termination

was in [Walter's] best interests."[14] She again argues that Cahill lacked information in forming his opinion, specifically, evidence regarding negative drug tests and the counselor's opinion about her sobriety. She also argues that before a best interests determination can be made, it is necessary to know whether the child will be placed in a home consistent with ICWA placement preferences. She argues the State failed to give Cahill information about Walter's likely permanent placement.

[8] As explained above, the best interests element is imposed by state law and generally requires proof by clear and convincing evidence. We decline to extend the heightened standard in § 43-1505(6) to all elements of an ICWA parental rights termination case. Just as we did not apply the heightened standard to the active efforts element, we will not apply the heightened standard to the state law elements under § 43-292 for terminating parental rights. As noted by the Utah Court of Appeals, "ICWA does not preempt any state law grounds for termination of parental rights or impose a single burden of proof on all supporting findings in termination proceedings in which it applies."[15] We note that in *In re Interest of C.W. et al.*,[16] we "[found] that the State [had] prove[d] beyond a reasonable doubt that the best interests of the children require[d] termination of [the mother's] parental rights." This language appears in dicta, and to the extent it suggests the State must prove the best interests element beyond a reasonable doubt, we disapprove this language. Therefore, we hold that the State must prove by clear and convincing evidence that terminating parental rights is in the child's best interests; this need not include testimony of a qualified expert witness. Martina's argument that the State's expert testimony was insufficient to establish the best interests element beyond a reasonable doubt is without merit.

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[14] Brief for appellant at 35.

[15] *K.E. v. State*, 912 P.2d 1002, 1004 (Utah App. 1996). See, also, *In re M.S., supra* note 9; *In re Interest of D.S.P.*, 166 Wis. 2d 464, 480 N.W.2d 234 (1992); *In re Bluebird*, 105 N.C. App. 42, 411 S.E.2d 820 (1992).

[16] *In re Interest of C.W. et al.,* 239 Neb. 817, 831, 479 N.W.2d 105, 115 (1992).

[9] When a parent is unable or unwilling to rehabilitate himself or herself within a reasonable time, the child's best interests require termination of parental rights.[17] The court originally removed Walter from Martina's custody because of her illegal drug use. With Martina's history of drug abuse, we are concerned that she failed to complete requested urinalysis screenings. We recognize that Martina submitted some negative urinalysis screenings in 2004 and 2005. But between January and May 2005, she failed to complete 10 urinalysis screenings that the case manager requested.

In addition to the missed urinalysis screenings, the record shows that Martina has not acquired the responsibility needed to parent a child. For instance, in October 2004—2 weeks before Martina delivered her next child—she was asked to leave the shelter where she was staying because she was intoxicated. In June 2006, she called the case manager seeking advice on how to keep custody of any other children she might have. She told the case manager she was living with a man she had previously lived with and wondered if that would affect her ability to keep custody of any other children. This man was about 20 years old and a former ward of the State. Martina had reported in 2004 that she asked him to leave her home because he admitted to sexually abusing another child when he was 12 years old. Viewed through the lens of life's experiences, these two examples illustrate that Martina does not appreciate the responsibilities of parenting.

The record also shows that the director of ICWA affairs for the Yankton Sioux Tribe attended a foster care review board meeting in October 2004. A report created after the meeting stated, in part: "[The director] indicated that permanency for Walter is of utmost importance. He indicated that the tribe would not object to termination of [Martina's] rights, as [the tribe] would like Walter to be adopted." Similarly, Cahill opined that based on Martina's diagnoses and her history, she cannot provide permanency for Walter.

[10] When the court first terminated Martina's parental rights in September 2005, Walter had spent his entire life, 2½ years,

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[17] See *In re Interest of Destiny A. et al., supra* note 4.

in foster care. Children cannot, and should not, be suspended in foster care or be made to await uncertain parental maturity.[18] We conclude the State provided clear and convincing evidence that terminating Martina's parental rights is in Walter's best interests.

4. We Do Not Reach the Merits of Martina's Second Assignment of Error

[11,12] As her second assignment of error, Martina argues that the court erred at the adjudication stage because she claims ICWA requires a finding of active efforts at adjudication and the court did not make such a finding. We have stated that a proceeding before a juvenile court is a "special proceeding" for appellate purposes.[19] We have further held that a judicial determination following an adjudication in a special proceeding which affects the substantial right of parents to raise their children is a final, appealable order.[20] Martina did not appeal the court's adjudication order.

Martina, however, argues "[t]his issue cannot be dismissed as a collateral attack on a final order from which [she] failed to perfect an appeal."[21] She claims the Court of Appeals' dismissal of an appeal in an unrelated case precludes appeals from adjudications or dispositions in ICWA cases.[22] Martina's belief that the unrelated Court of Appeals' dismissal precluded her appeal in the present case does not excuse her failure to appeal the adjudication order. Martina could have asked the Court of Appeals to overrule its prior ruling. Because Martina failed to appeal the adjudication order, we will not address her arguments about alleged errors at the adjudication stage.

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[18] See *id.*

[19] *In re Interest of Ty M. & Devon M.*, 265 Neb. 150, 655 N.W.2d 672 (2003).

[20] *Id.*

[21] Brief for appellant at 40.

[22] See *In re Interest of David T.,* 12 Neb. App. xlii (No. A-03-589, Nov. 5, 2003).

V. CONCLUSION

We conclude that in termination of parental rights cases, the standard of proof for the "active efforts" element in § 43-1505(4) is proof by clear and convincing evidence. We determine that the State proved by clear and convincing evidence that the Department made active efforts. We also conclude that the State met its burden in proving the "serious emotional or physical damage" element and that terminating Martina's parental rights is in Walter's best interests. Because Martina failed to appeal the adjudication order, we do not reach the merits of her second assignment of error.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
MICHAEL J. RAMIREZ, APPELLANT.
745 N.W.2d 214

Filed January 25, 2008. No. S-06-920.

1. **Effectiveness of Counsel: Appeal and Error.** Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact. When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error. With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an appellate court reviews such legal determinations independently of the lower court's decision.
2. **Postconviction: Effectiveness of Counsel: Proof: Appeal and Error.** In order to establish a right to postconviction relief based on a claim of ineffective assistance of counsel at trial or on direct appeal, the defendant has the burden, in accordance with *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), to first show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area. Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case. In order to show prejudice, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. The two prongs of this test, deficient performance and prejudice, may be addressed in either order.
3. **Postconviction: Effectiveness of Counsel: Appeal and Error.** Although a motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal, when a defendant was represented

both at trial and on direct appeal by the same lawyer, the defendant's first opportunity to assert ineffective assistance of trial counsel is in a motion for postconviction relief.

4. **Double Jeopardy.** The Double Jeopardy Clauses of both the federal Constitution and the Nebraska Constitution protect against three distinct abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense.
5. **Constitutional Law: Sentences: Legislature: Intent.** Where the Legislature intends to impose multiple punishments, imposition of such sentences does not violate the Constitution.
6. **Prior Convictions: Habitual Criminals: Sentences: Statutes.** A defendant should not be subjected to double penalty enhancement through application of both a specific subsequent offense statute and a habitual criminal statute.
7. **Prior Convictions: Sentences.** The use of a prior conviction to establish status as a felon and then enhance a sentence does not constitute impermissible double enhancement.
8. **Criminal Law: Statutes: Legislature: Intent.** Although the rule of lenity requires a court to resolve ambiguities in a penal code in the defendant's favor, the touchstone of the rule of lenity is statutory ambiguity, and where the legislative language is clear, a court may not manufacture ambiguity in order to defeat that intent.
9. **Search Warrants: Affidavits.** An affidavit in support of a search warrant need not contain a separate statement of facts showing why the public interest requires that the warrant be served at night, in order for the nighttime search to be valid.
10. ____: ____. If an affidavit in support of a search warrant, read in a commonsense manner and as a whole, reasonably supports the inference that the interests of justice are best served by the authorization of nighttime service of a search warrant, provision for such service in the warrant is proper.
11. **Search Warrants.** Neb. Rev. Stat. § 29-411 (Reissue 1995) codifies the common-law requirement of knocking and announcing when serving a search warrant prior to breaking into a person's dwelling.
12. **Constitutional Law: Search and Seizure: Intent.** The Fourth Amendment to the U.S. Constitution requires, absent countervailing circumstances, that officers knock and announce their purpose and be denied admittance prior to breaking into a dwelling.
13. **Effectiveness of Counsel: Appeal and Error.** When reviewing a claim of ineffective assistance of counsel, an appellate court will not second-guess reasonable strategic decisions by counsel.
14. **Effectiveness of Counsel: Presumptions: Appeal and Error.** The entire ineffective assistance of counsel analysis is viewed with a strong presumption that counsel's actions were reasonable and that even if they are found unreasonable, the error justifies setting aside the judgment only if there was prejudice.
15. **Criminal Law: Weapons.** Where actual or constructive possession of a firearm by a felon is uninterrupted, it constitutes a single offense.

Appeal from the District Court for Scotts Bluff County: ROBERT O. HIPPE, Judge. Affirmed.

James R. Mowbray and Robert W. Kortus, of Nebraska Commission on Public Advocacy, for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

GERRARD, J.

I. NATURE OF CASE

Michael J. Ramirez was convicted by the district court in 2004 with use of a firearm to commit a felony,[1] being a felon in possession of a firearm,[2] and terroristic threats.[3] Ramirez was also found to be a habitual criminal.[4] Ramirez was acquitted by a jury of a count of possession of methamphetamine. Ramirez was sentenced, collectively, to terms of imprisonment totaling not less than 25 nor more than 50 years. His trial counsel also served as counsel on direct appeal, and the only issue raised in his brief was whether his sentences were excessive. The Nebraska Court of Appeals summarily affirmed.[5]

Ramirez filed a motion for postconviction relief in the district court on November 23, 2005, alleging ineffective assistance of counsel in several respects. The court, after an evidentiary hearing, denied Ramirez' motion, and he appeals. The evidence pertinent to the issues Ramirez raises on appeal will be set forth below, in conjunction with our analysis of each issue.

II. ASSIGNMENTS OF ERROR

Ramirez assigns, consolidated and restated, that the district court erred in failing to conclude that

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[1] See Neb. Rev. Stat. § 28-1205 (Reissue 1995).

[2] See Neb. Rev. Stat. § 28-1206 (Reissue 1995).

[3] See Neb. Rev. Stat. § 28-311.01(1)(a) (Reissue 1995).

[4] See Neb. Rev. Stat. § 29-2221 (Reissue 1995).

[5] See *State v. Ramirez*, 13 Neb. App. xxxix (No. A-04-1398, May 5, 2005).

(1) his rights to double jeopardy and due process were violated when the same felony conviction was used as a predicate for (a) being a felon in possession of a firearm and (b) the habitual criminal enhancement of his sentence for being a felon in possession of a firearm;

(2) he was deprived of effective assistance of counsel when counsel failed to adequately seek the suppression of evidence obtained from the search of his residence; and

(3) he was deprived of effective assistance of counsel when his counsel failed to (a) object to inadmissible evidence, (b) introduce favorable evidence, and (c) impeach witnesses at trial with inconsistent evidence from the affidavit used to obtain the search warrant.

III. STANDARD OF REVIEW

[1] Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact. When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error. With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*,[6] an appellate court reviews such legal determinations independently of the lower court's decision.[7]

IV. ANALYSIS

[2] Ramirez' arguments are each framed by whether he was denied effective assistance of counsel at trial. In order to establish a right to postconviction relief based on a claim of ineffective assistance of counsel at trial or on direct appeal, the defendant has the burden, in accordance with *Strickland*,[8] to first show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area. Next, the defendant

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[6] *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

[7] *State v. Sims*, 272 Neb. 811, 725 N.W.2d 175 (2006).

[8] *Strickland, supra* note 6.

must show that counsel's deficient performance prejudiced the defense in his or her case. In order to show prejudice, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. The two prongs of this test, deficient performance and prejudice, may be addressed in either order.[9]

[3] Before addressing the specific arguments Ramirez makes on appeal, we note that the issues raised are not procedurally barred. Although a motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal,[10] when a defendant was represented both at trial and on direct appeal by the same lawyer, the defendant's first opportunity to assert ineffective assistance of trial counsel is in a motion for postconviction relief.[11]

1. Double Jeopardy

Ramirez argues that his rights under the Double Jeopardy Clause were violated when the same felony conviction was used to prove his status as a felon for the charge of being a felon in possession of a firearm, then prove he was a habitual criminal for the purpose of enhancing his sentence on that charge. Ramirez claims that his right to effective assistance of counsel was violated because trial counsel did not object to the sentencing enhancement on double jeopardy grounds. The postconviction court rejected this argument, concluding that Ramirez was not prejudiced by counsel's failure to object because the Double Jeopardy Clause does not preclude the use of the same felony to establish felon status and then enhance a sentence.

(a) Background

The information charging Ramirez with being a habitual criminal alleged three predicates: (1) a 1991 conviction for possession of marijuana with intent to deliver, (2) a 1999 conviction for theft, and (3) a 2000 conviction for manufacturing or distributing marijuana. But at sentencing, the State only

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[9] *Sims, supra* note 7.

[10] *State v. Marshall*, 269 Neb. 56, 690 N.W.2d 593 (2005).

[11] *State v. McHenry*, 268 Neb. 219, 682 N.W.2d 212 (2004).

presented evidence of the 1991 and 2000 convictions to support sentencing as a habitual criminal. And, as previously noted, Ramirez was convicted pursuant to jury verdict of being a felon in possession of a firearm. The only evidence adduced at trial to establish Ramirez' status as a felon was evidence of the 2000 marijuana conviction. The habitual criminal finding was used to enhance Ramirez' sentence for being a felon in possession of a firearm.

Trial counsel testified in his deposition, on postconviction, that he "briefly" considered the double jeopardy implications of the charges, but did not pursue the issue "[w]hen [he] noticed there were three prior felonies as opposed to two." Counsel later admitted that he did not specifically consider the double jeopardy implications of using the same felony conviction for the offense of felon in possession and then for the habitual criminal enhancement.

(b) Analysis

[4,5] The Double Jeopardy Clauses of both the federal Constitution and the Nebraska Constitution protect against three distinct abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense.[12] Ramirez' argument here seems to be that he is being subjected to multiple punishments for the same offense, although his argument also implicates statutory interpretation. However, in this context, the two inquiries are related. As the U.S. Supreme Court has explained with respect to the prohibition on multiple punishments, "the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended."[13] The question of what punishments are constitutionally permissible is no different from the question of what punishment the legislative

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[12] *State v. Mata*, 266 Neb. 668, 668 N.W.2d 448 (2003).

[13] *Missouri v. Hunter*, 459 U.S. 359, 366, 103 S. Ct. 673, 74 L. Ed. 2d 535 (1983).

branch intended to be imposed.[14] Where the Legislature intends to impose multiple punishments, "imposition of such sentences does not violate the Constitution."[15] With those principles in mind, we turn to the statutes at issue in this case.

Section 28-1206(1) provides that "[a]ny person who possesses any firearm . . . and who has previously been convicted of a felony . . . commits the offense of possession of a deadly weapon by a felon . . . ." Possession of a firearm by a felon is a Class III felony.[16] And § 29-2221(1) provides, subject to certain exceptions not relevant here, that

> [w]hoever has been twice convicted of a crime, sentenced, and committed to prison . . . for terms of not less than one year each shall, upon conviction of a felony committed in this state, be deemed to be a habitual criminal and shall be punished by imprisonment . . . for a mandatory minimum term of ten years and a maximum term of not more than sixty years . . . .

It is clear that standing alone, neither § 28-1206 nor § 29-2221 implicates double jeopardy.[17] Ramirez does not contend otherwise. Instead, he relies on our decisions in *State v. Chapman*[18] and *State v. Hittle*,[19] which he claims are applicable.

In *Chapman*, the defendant was charged with third-offense driving under the influence of alcoholic liquor (DUI) and being a habitual criminal. Evidence was received of three prior convictions for DUI, and the trial court found that the offense with which the defendant was charged was a third offense. The defendant had previously been convicted of two felonies: third-offense DUI and malicious destruction of property. Based

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[14] *Albernaz v. United States*, 450 U.S. 333, 101 S. Ct. 1137, 67 L. Ed. 2d 275 (1981). Accord *Hunter, supra* note 13.

[15] *Albernaz, supra* note 14, 450 U.S. at 344.

[16] § 28-1206(3)(b).

[17] See, *State v. Peters*, 261 Neb. 416, 622 N.W.2d 918 (2001); *Addison v. Parratt*, 208 Neb. 459, 303 N.W.2d 785 (1981). See, also, *Witte v. United States*, 515 U.S. 389, 115 S. Ct. 2199, 132 L. Ed. 2d 351 (1995).

[18] *State v. Chapman*, 205 Neb. 368, 287 N.W.2d 697 (1980).

[19] *State v. Hittle*, 257 Neb. 344, 598 N.W.2d 20 (1999).

upon those two felonies, the court sentenced the defendant as a habitual criminal under § 29-2221.[20]

On appeal, we rejected the defendant's constitutional claims.[21] But we concluded that the trial court had erred in its interpretation of the relevant statutes. We explained:

> For the first time, this court faces the question of whether a previous conviction of an offense made a felony solely by reason of a previous conviction may be utilized as a basis for an adjudication of habitual criminality under the habitual criminal statute. We hold that offenses which are felonies because the defendant has been previously convicted of the same crime do not constitute "felonies" within the meaning of prior felonies that enhance penalties under the habitual criminal statute.
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> The weight of authority is against double penalty enhancement through application of both a specific subsequent offense statute and a habitual criminal statute. . . . [T]hese decisions do not rest on federal constitutional grounds. The issue of whether, upon conviction of a misdemeanor, sentence could be imposed on a felony charge under a habitual criminal statute rests on an interpretation of state law.[22]

We noted that "[s]everal states have held that penalty enhancement provisions set forth for subsequent offenses of specific crimes must be used when applicable instead of sentencing under a habitual criminal act, implying that both statutes may not be used for double penalty enhancement in sentencing for one offense."[23] Adopting that reasoning, we concluded that a felony based on a multiple-offense DUI was exempt from the operation of § 29-2221.

In *Hittle*,[24] the defendant was convicted of felony flight to avoid arrest and felony driving under a 15-year license

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[20] See *Chapman, supra* note 18.

[21] See *id.*

[22] *Id.* at 370, 287 N.W.2d at 698-99 (citations omitted).

[23] *Id.* at 371, 287 N.W.2d at 699 (emphasis omitted).

[24] *Hittle, supra* note 19.

suspension. The trial court found the defendant to be a habitual criminal, based on two predicate terms of imprisonment, one of which was for second-offense driving on a suspended license.

[6] On appeal, we acknowledged that *Chapman* was distinguishable, because even first-offense driving under a 15-year license suspension is a Class III felony.[25] But we explained *Chapman* as resting upon two general principles:

> (1) A defendant should not be subjected to double penalty enhancement through application of both a specific subsequent offense statute and a habitual criminal statute and (2) the specific enhancement mechanism contained in Nebraska's DUI statutes precludes application of the general enhancement provisions set forth in the habitual criminal statute.[26]

We further explained that "[o]ne can become a felon for driving under a suspended license only by having first committed multiple DUI offenses, at least some of which are misdemeanors, for which the license suspension was imposed."[27] Thus, we observed, "in a real sense, the penalty for this particular act has been enhanced by virtue of the defendant's prior violations of other provisions within the same statute."[28] Based on that reasoning, we concluded that a felony conviction for driving under a suspended license in violation of the DUI statutes could not be used to enhance a sentence under the habitual criminal statute.

[7] Ramirez argues that *Chapman* and *Hittle* are applicable here. But while some courts have extended "double enhancement" reasoning to situations involving enhancement of a sentence for being a felon in possession of a weapon,[29] the weight

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[25] See *id*.

[26] *Id*. at 355, 598 N.W.2d at 29.

[27] *Id*. at 356, 598 N.W.2d at 29.

[28] *Id*.

[29] See, e.g., *State v. Baker*, 970 So. 2d 948 (La. 2007); *Jackson v. Com.*, 650 S.W.2d 250 (Ky. 1983); *State v. Ware*, 201 Kan. 563, 442 P.2d 9 (1968); *State v. Haddenham*, 110 N.M. 149, 793 P.2d 279 (N.M. App. 1990); *Ramirez v. State*, 527 S.W.2d 542 (Tex. Crim. App. 1975); *State v. Smith*, 12 Ariz. App. 272, 469 P.2d 838 (1970).

of recent authority has established the rule that the use of a prior conviction to establish status as a felon and then enhance a sentence does not constitute impermissible double enhancement.[30] We find those decisions to be more persuasive and consistent with Nebraska law.

First, *Chapman* and *Hittle* both rest on the Legislature's specific intention in enacting the repeat offender enhancements of the DUI statutes, which are obviously not at issue here. And many courts that have rejected the use of a conviction to both establish status and enhance a sentence have done so, like this court in *Hittle* and *Chapman*,[31] because the status offense contained a specific penalty provision that would have been effectively nullified by the additional enhancement.[32] But that reasoning has been rejected when considering statutes that, like § 28-1206, do not expressly include their own sentencing provisions.[33] Other courts that have rejected the use of a conviction to both establish status and enhance a sentence have relied on the implicit statutory conflict that arose when, under their enhancement provisions, a single predicate conviction was sufficient to enhance the sentence for a second conviction.[34] But again, that reasoning is not applicable here, because under Nebraska law, a predicate conviction does not automatically prove the entire basis for enhancement of a sentence.[35]

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[30] See, e.g., *U.S. v. Bates*, 77 F.3d 1101 (8th Cir. 1996); *U.S. v. Wallace*, 889 F.2d 580 (5th Cir. 1989); *People v. Baird*, 12 Cal. 4th 126, 906 P.2d 1220, 48 Cal. Rptr. 2d 65 (1995); *Gholston v. State*, 620 So. 2d 719 (Ala. 1993); *Woodson v. State*, 302 Ark. 10, 786 S.W.2d 120 (1990); *Woods v. State*, 471 N.E.2d 691 (Ind. 1984); *People v. Bergstrom*, 190 Colo. 105, 544 P.2d 396 (1975); *Bailleaux v. Gladden*, 230 Or. 606, 370 P.2d 722 (1962); *State v. Crump*, 178 N.C. App. 717, 632 S.E.2d 233 (2006); *People v. Phillips*, 219 Mich. App. 159, 555 N.W.2d 742 (1996); *Fry v. State*, 655 P.2d 789 (Alaska App. 1983). Cf. *State v. Wardell*, 329 Mont. 9, 122 P.3d 443 (2005).

[31] *Hittle, supra* note 19; *Chapman, supra* note 18.

[32] See, e.g., *Baker, supra* note 29; *Ware, supra* note 29; *Smith, supra* note 29.

[33] See, *Bergstrom, supra* note 30; *Fry, supra* note 30.

[34] See, e.g., *Jackson, supra* note 29; *Ware, supra* note 29; *Smith, supra* note 29.

[35] See § 29-2221. See, also, *Bergstrom, supra* note 30, citing *Hollander v. Warden*, 86 Nev. 369, 468 P.2d 990 (1970); *Fry, supra* note 30.

Nor, under Nebraska law, are the predicates for §§ 28-1206 and 29-2221 necessarily coextensive. The predicate for violating § 28-1206 is a felony conviction, which may or may not result in the term of imprisonment of "not less than one year" necessary to establish a predicate for sentence enhancement under § 29-2221.[36] The fact that the predicates for §§ 28-1206 and 29-2221 are defined in different terms suggests that the same conviction can be used for both status and enhancement if that conviction meets the independent requirements of each statute.[37] Stated another way, the element of § 28-1206 to be proved is the fact of a prior felony conviction, while the element of § 29-2221 to be proved is a prior conviction resulting in a term of imprisonment of no less than 1 year. "The distinction between a prior felony conviction and a separate prison term served for such felony is obvious," and there is no statutory conflict or double enhancement where, as here, a fact (i.e., the service of a prior prison term) that is not integral or indispensable to an element of possession of a firearm by a felon (i.e., a prior felony conviction) is used to enhance the sentence.[38]

Most importantly, this case simply does not involve double penalty enhancement. There is a significant distinction between double enhancement, which involves the "stacking" of multiple enhancement provisions that this court rejected in *Chapman*,[39] and the use of a conviction to establish status and then enhance a sentence.[40] And under Nebraska law, possession of a firearm by a felon is simply a Class III felony,[41] with no indication that it should be treated differently from any other Class III felony for purposes of sentence enhancement. The habitual criminal statute is, admittedly, a sentence enhancement—a stiffened penalty for the latest crime which is considered to be an

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[36] See Neb. Rev. Stat. § 28-105(1) (Cum. Supp. 2006).

[37] See, *Baird, supra* note 30; *Gholston, supra* note 30.

[38] See *Baird, supra* note 30, 12 Cal. 4th at 132, 906 P.2d at 1224, 48 Cal. Rptr. 2d at 69. See, also, *Gholston, supra* note 30.

[39] *Chapman, supra* note 18.

[40] See, *Wallace, supra* note 30; *Wardell, supra* note 30; *Bailleaux, supra* note 30; *Crump, supra* note 30.

[41] § 28-1206(3)(b).

aggravated offense because it is a repetitive one.[42] Section 28-1206, however, is not a subsequent offense enhancement,[43] but a separate offense, enacted "'"to lessen 'a high potential of danger to the public' and to reduce the 'probability that the convicted individual would continue his criminal activity.' . . ."'"[44] Prohibiting a convicted felon from possessing a firearm neither punishes the felon for the underlying felony, nor enhances the sentence for another conviction—it is a new and separate crime of which the prior conviction is merely an element.[45]

As previously noted, the fundamental question in this double jeopardy analysis is one of legislative intent.[46] And it is apparent, from Nebraska's statutory scheme, that the Legislature intended for habitual criminals to be sentenced pursuant to § 29-2221, even when convicted of violating § 28-1206. The statutes define their necessary predicate elements using different standards. Possession of a firearm by a convicted felon is a Class III felony, with no statutory indication that it is meant to be treated differently from any other felony. In fact, § 28-105(3), which classifies felonies, specifically states that "[n]othing in this section shall limit the authority granted in sections 29-2221 and 29-2222 [(Reissue 1995)] to increase sentences for habitual criminals." And § 29-2221(1)(a) and (b) contain particular provisions for enhancing sentences for various crimes of violence, indicating that the Legislature has considered the implications of enhancing sentences for convictions under different statutes.

[8] Stated another way, there is no ambiguity in either § 28-1206 or § 29-2221, and Ramirez' arguments do not provide us with a compelling basis for disregarding clear statutory mandates. The Double Jeopardy Clause does not impose "a constitutional rule requiring courts to negate clearly expressed

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[42] *Addison, supra* note 17. Accord *Witte, supra* note 17.

[43] See *Hittle, supra* note 19.

[44] *Peters, supra* note 17, 261 Neb. at 423, 622 N.W.2d at 925.

[45] See *id.*

[46] See *Hunter, supra* note 13.

legislative intent."[47] Although the rule of lenity requires a court to resolve ambiguities in a penal code in the defendant's favor, the touchstone of the rule of lenity is statutory ambiguity, and where the legislative language is clear, "'we may not manufacture ambiguity in order to defeat that intent.' . . . Lenity thus serves only as an aid for resolving an ambiguity; it is not to be used to beget one."[48]

> Neither the habitual offender statute nor the felon in possession of a firearm statute prohibits the application of the statutory habitual offender sentence enhancement provision for a conviction of felon in possession of a firearm. Nor do these statutes expressly preclude a prior felony conviction that is used to establish the crime of felon in possession of a firearm from also being used as a prior conviction under the habitual offender statutes. . . . "Thus absent an absurd or unjust result, or one clearly inconsistent with the purposes and policies of the statutes involved, [this Court] would not be justified in concluding that the statutes' respective mutual use of a prior conviction" is prohibited.[49]

In short, where neither § 28-1206 nor § 29-2221 violates double jeopardy individually, there is no reason why they would offend the Double Jeopardy Clause when used in conjunction.[50] We reject Ramirez' claim that the Double Jeopardy Clause precluded the use of his 2000 marijuana conviction to establish his status as a felon for purposes of § 28-1206 and then enhance his sentence on that charge pursuant to § 29-2221. And because his sentence was lawful, he was not prejudiced by his trial counsel's failure to object on that basis. For those reasons, we find Ramirez' first assignment of error to be without merit.

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[47] *Id.*, 459 U.S. at 368.

[48] *Albernaz, supra* note 14, 450 U.S. at 342.

[49] *Phillips, supra* note 30, 219 Mich. App. at 163, 555 N.W.2d at 744 (citation omitted). See, also, *Gholston, supra* note 30; *Woods, supra* note 30.

[50] See *Bates, supra* note 30.

2. Motion to Suppress Evidence

Ramirez contends that trial counsel should have moved to suppress evidence obtained from the execution of a search warrant, because an "any time" warrant was not justified, and the police did not "knock and announce" their presence when serving the warrant. The district court found that Ramirez had not been prejudiced because a motion to suppress would have been without merit.

(a) Background

(i) Trial Evidence

The police investigation which led to the charges in this case began on June 10, 2004, when Melissa Bates called police and reported that she had been threatened at the home of Lucy Marlatt, where she was staying. Bates came in to the police department and made a report, along with Amber Troudt, Marlatt's daughter. Michael Cotant, an investigator with the Scotts Bluff County Sheriff's Department, interviewed Bates and Troudt and contacted the county attorney's office. Cotant secured a search warrant for Marlatt's residence, where Ramirez was also staying, and an arrest warrant for Ramirez.

In support of the application for the warrants, Cotant prepared two affidavits, in which he averred that Troudt and Bates had informed him they had seen Ramirez with drugs and drug paraphernalia. Cotant averred that Ramirez was a convicted felon and that Bates had seen Ramirez with a shotgun that he kept with him. Cotant also averred that Bates had reported that on June 2 or 3, 2004, Ramirez had pointed the shotgun at Bates and threatened to kill her.

The district court issued a search warrant at 11:42 p.m. on June 10, 2004. The court found probable cause for the search of Marlatt's residence "and that the public interest requires that this warrant be served at any time." Marlatt had already been detained at a grocery store and taken to the Scottsbluff Police Department, and Cotant served the warrant on her there. Police finally began conducting the search at approximately 3:30 a.m. The search revealed, among other things, a 12 gauge shotgun.

The commander of the Scottsbluff SWAT team testified that his unit was assigned to execute the search warrant. He

explained that his team had approached the house on foot from some distance away and had then attempted to determine where Ramirez was in the house. They were still outside the house when some dogs on the porch began barking, and Ramirez, who was inside the house, began yelling at the dogs to be quiet. The dogs kept barking, and Ramirez came to the front door. The commander challenged Ramirez, identified himself, and ordered Ramirez to show his hands and get down on the ground. Ramirez complied, and police handcuffed him and secured the residence.

(ii) Postconviction Evidence

Trial counsel testified that he had considered filing a motion to suppress, but decided not to when Ramirez informed him that the search had essentially taken place as described. Counsel said he had been advised by Ramirez that Ramirez had opened the front door when he heard his dogs barking and that when he had seen the police, he had stepped onto the patio and placed his hands behind his back to submit to the SWAT team commander. Counsel had not considered a "knock and announce" issue because Ramirez had opened the door before the police could knock. Counsel also explained that given the facts in the affidavit, he believed the court could have issued an "any time" warrant. Ramirez averred, in an affidavit admitted at the evidentiary hearing, that he had informed counsel that on the night of his arrest, he had been awakened by barking dogs and had actually opened the back door of the home.

(b) Analysis

For the reasons explained below, we agree with the district court's conclusion that a motion to suppress would have been meritless. Therefore, counsel was not ineffective in not filing such a motion, nor was Ramirez prejudiced by the alleged ineffectiveness.

(i) Any Time Search

[9,10] Neb. Rev. Stat. § 29-814.04 (Reissue 1995) provides in part that when a court issues a search warrant, "[t]he warrant shall direct that it be served in the daytime unless the magistrate or judge is satisfied that the public interest requires that

it should not be so restricted, in which case the warrant may direct that it may be served at any time." But an affidavit in support of a search warrant need not contain a separate statement of facts showing why the public interest requires that the warrant be served at night, in order for the nighttime search to be valid.[51] Instead, if the affidavit, read in a commonsense manner and as a whole, reasonably supports the inference that the interests of justice are best served by the authorization of nighttime service of a search warrant, provision for such service in the warrant is proper.[52]

Ramirez contends that the affidavit in his case did not set forth a sufficient factual basis for the issuance of an "any time" warrant. We disagree. The affidavit established that Ramirez used methamphetamine, had a shotgun and ammunition, kept the shotgun with him, and had threatened Bates with the shotgun. Thus, the affidavit provided information showing that the execution of the warrant at night, when speed and surprise could be accomplished, would serve to protect the safety of the officers involved. Because the search warrant properly authorized an "any time" search, Ramirez failed to prove counsel was ineffective, or that he was prejudiced, because counsel failed to challenge the warrant.

(ii) Knock and Announce

[11,12] Neb. Rev. Stat. § 29-411 (Reissue 1995) provides that in executing a search or arrest warrant, the executing officer

> may break open any outer or inner door or window of a dwelling house or other building, if, after notice of his office and purpose, he is refused admittance; or without giving notice of his authority and purpose, if the judge or magistrate issuing a search warrant has inserted a direction therein that the officer executing it shall not be required to give such notice . . . . The judge or magistrate may so direct only upon proof under oath, to his satisfaction that the property sought may be easily or quickly destroyed or

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[51] *State v. Fitch*, 255 Neb. 108, 582 N.W.2d 342 (1998). See, also, *State v. Paul*, 225 Neb. 432, 405 N.W.2d 608 (1987).

[52] *Peters, supra* note 17; *Fitch, supra* note 51; *Paul, supra* note 51.

> disposed of, or that danger to the life or limb of the officer or another may result, if such notice be given . . . .

This statute codifies the common-law requirement of knocking and announcing when serving a search warrant prior to breaking into a person's dwelling.[53] And the Fourth Amendment to the U.S. Constitution also requires, absent countervailing circumstances, that officers knock and announce their purpose and be denied admittance prior to breaking into a dwelling.[54]

In this case, the court did not issue a "no knock" warrant pursuant to § 29-411. But the record indicates that Ramirez opened the door, and surrendered to police, before they had an opportunity to knock and announce their presence. Although Ramirez averred that he stepped out the back door, rather than the front door, he does not contest the essential fact that he came out of the house before the police went in. In other words, Ramirez was aware of the presence of the police, and aware of their identity and purpose, before they entered the dwelling. Further identification would have been "'a useless gesture.'"[55] We agree with the district court that under these circumstances, the knock and announce rule was not violated.[56]

Because Ramirez' trial counsel did not perform deficiently in failing to object to the search of the residence, and Ramirez was not prejudiced, this assignment of error is without merit.

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[53] *State v. Kelley*, 265 Neb. 563, 658 N.W.2d 279 (2003).

[54] See *id.*, citing *Wilson v. Arkansas*, 514 U.S. 927, 115 S. Ct. 1914, 131 L. Ed. 2d 976 (1995).

[55] See *State v. Pierson*, 238 Neb. 872, 877, 472 N.W.2d 898, 901 (1991).

[56] Compare, e.g., *United States v. Remigio*, 767 F.2d 730 (10th Cir. 1985); *United States v. Lopez*, 475 F.2d 537 (7th Cir. 1973); *Wittner v. United States*, 406 F.2d 1165 (5th Cir. 1969); *United States v. Conti*, 361 F.2d 153 (2d Cir. 1966), *vacated on other grounds* 390 U.S. 204, 88 S. Ct. 899, 19 L. Ed. 2d 1035 (1968); *Belton v. U.S.*, 647 A.2d 66 (D.C. 1994); *State v. Alldredge*, 73 Wash. App. 171, 868 P.2d 183 (1994); *Woodward v. Com.*, 16 Va. App. 672, 432 S.E.2d 510 (1993); *People v Zuccarini*, 172 Mich. App. 11, 431 N.W.2d 446 (1988).

3. Failure to Object to Inadmissible Evidence, Adduce Favorable Evidence, and Impeach Witnesses at Trial

In his remaining three assignments of error, Ramirez raises several arguments with respect to trial counsel's decisions at trial. The district court rejected each of these arguments, either because they were reasonable strategic decisions made my counsel or because Ramirez was not prejudiced by them. Because Ramirez' arguments involve related testimony, it is easiest to consider them together.

(a) Background

(i) Trial Evidence

At trial, Bates testified that in May and June 2004, she was living in Marlatt's home near Minatare, Nebraska. At the time, a number of people were staying with Marlatt, including Bates and her daughters, Marlatt's daughters, and Ramirez. Bates testified that sometime during the week of June 7, Ramirez asked Bates to step outside so he could speak to her. Ramirez was upset, and Bates asked Ramirez what his problem was with her. Bates testified that Ramirez reached into his parents' vehicle, parked outside, and pulled out a double-barreled shotgun,

> [a]nd, he pointed it at my face at one point in time of the conversation, and I asked him if he was going to shoot me, and he screamed — he hollered a couple of things at me, me being a stupid bitch. And, then he pointed the gun above my head approximately an inch to two inches above my head and he shot off three rounds.

Bates identified the shotgun seized from the residence as the one Ramirez had brandished. In addition, the police found three expended shotgun shells in the driveway. Later, a witness identified the shotgun as one that he had received as a birthday present in 2003 and had sold to Ramirez in April 2004 for $200.

The amended information charged Ramirez with being in possession of a firearm "on or about the week of June 7, 2004." But Bates testified, without objection, that she had seen Ramirez with the shotgun before the incident and that he "carried it around quite a bit" and "would always have a gun with him." Bates also testified, without objection, that Ramirez often left the gun around the house and "shot the gun off a lot." Bates

was asked if Ramirez had made any other threats with the shotgun, and answered, without objection, that "he stated that if the police were going to come after him, that he wouldn't be taken into custody, he would kill them first."

Bates said that she was high at the time of the incident, and "didn't realize what was going on at the time," but reported the incident to police a couple of days later after she realized that Ramirez was dangerous. Ramirez' trial counsel cross-examined Bates regarding her history of drug use, and particularly her use of methamphetamine at the time of the incident. Counsel also questioned Bates about Ramirez' tone of voice during the incident, and when asked whether Ramirez had "scream[ed]" at Bates, Bates replied without objection, "No, he had the intent to frighten me." Ramirez' counsel responded by asking Bates whether she had studied law and to what extent she had prepared her testimony.

(ii) Postconviction Evidence

Ramirez' trial counsel was a deputy public defender with the Scotts Bluff County public defender's office, experienced in defending both misdemeanor and felony cases. Before joining the public defender, trial counsel had also been a prosecutor in Scotts Bluff County.

Trial counsel was asked, in his deposition, whether testimony that put Ramirez in possession of a firearm outside the charged timeframe of the week of June 7, 2004, was "something [he] would have wanted to object to." Counsel admitted that he "[i]n retrospect, probably" should have objected. Counsel explained that he did not believe the questions had been particularly objectionable, but "[w]ith 20/20 hindsight, watching the game film, yeah, maybe I'd have done a motion to strike." Counsel was also asked about impeaching Bates on cross-examination and explained that Bates was "crying on the stand, [and] had engendered, in my view, quite a bit of juror sympathy." Counsel explained that he believed Bates' testimony "had had doubt cast upon it significantly" and that he felt an objective fact finder would have found her testimony incredible.

Counsel also was questioned about statements in the affidavit supporting the search warrant, and in Marlatt's pretrial

deposition, indicating that Marlatt had asked Bates to leave the residence on the evening of June 9, 2004. Marlatt testified in her pretrial deposition that "the night [she] went to jail on the warrant," she had "kicked [Bates] out" of the house. Marlatt explained that she had become tired of Bates' being gone and leaving her 2-year-old daughter unattended, claiming to be pregnant, and using drugs and claiming to have had a miscarriage.

Trial counsel explained that he decided "not [to] use . . . Marlatt's testimony during trial concerning any kind of drug use because I believed the results would have been disastrous." Marlatt's deposition had also indicated that she had seen Ramirez with the shotgun and that she was aware of Ramirez' drug use. Marlatt also testified in her deposition that the breaking point with Bates had been that "she was telling me all these lies" including that "he had threatened her life."

(b) Analysis

[13,14] Ramirez argues that his trial counsel was deficient in several instances. For the reasons that follow, we conclude that each instance was either reasonable trial strategy by trial counsel or was not prejudicial to Ramirez. An appellate court will not second-guess reasonable strategic decisions by counsel.[57] The entire ineffectiveness analysis is viewed with a strong presumption that counsel's actions were reasonable and that even if they are found unreasonable, the error justifies setting aside the judgment only if there was prejudice.[58]

[15] Ramirez first complains that trial counsel did not object to Bates' testimony about Ramirez' possession of the shotgun outside the charged timeframe and several other incidental remarks Bates made. We note that where actual or constructive possession of a firearm by a felon is uninterrupted, as the evidence suggests it was here, it constitutes a single offense.[59] But even if some of Bates' testimony was irrelevant, it was not prejudicial. There was no reason for the jury to find Bates' testimony credible on those subjects, but incredible with respect

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[57] *State v. Brown*, 268 Neb. 943, 689 N.W.2d 347 (2004).

[58] See *State v. McDermott*, 267 Neb. 761, 677 N.W.2d 156 (2004).

[59] See *State v. Williams*, 211 Neb. 650, 319 N.W.2d 748 (1982).

to her testimony about the incident for which Ramirez was convicted. If the jury believed Bates—which it obviously did—then her testimony about that incident alone would leave little alternative but to find Ramirez guilty. In short, Ramirez has not demonstrated a reasonable probability that had counsel objected to Bates' allegedly irrelevant testimony, the result of the proceeding would have been different.[60]

Ramirez argues that trial counsel should have done more to impeach Bates. For example, Ramirez contends that Marlatt could have testified about evicting Bates from her residence, about giving Bates a motive to lie, and about Bates' character for untruthfulness. But adducing that testimony would have opened the door to Marlatt's testimony, suggested in her deposition, that Bates was evicted in part because she reported to Marlatt that Ramirez had threatened Bates' life. Given that, it is evident that counsel made a reasonable strategic decision in not adducing the testimony. Ramirez also argues that Bates should have been cross-examined about alleged inconsistencies between her trial testimony and the police affidavits used to support the search and arrest warrants. Having reviewed the record, we are not convinced that they are as inconsistent as Ramirez asserts, and we conclude that Ramirez was not prejudiced by counsel's failure to use the affidavits on cross-examination.

Ramirez' brief also takes issue with several other alleged failures of trial counsel. We have reviewed the record and find each instance identified by Ramirez to be incidental. In each instance, Ramirez failed to demonstrate a reasonable probability that absent counsel's alleged deficiency, the result of the proceeding would have been different.

In short, Ramirez has failed to demonstrate that any of the alleged deficiencies in trial counsel's performance deprived Ramirez of effective assistance of counsel. We find no merit to Ramirez' remaining assignments of error.

V. CONCLUSION

For the foregoing reasons, the district court did not err in rejecting Ramirez' claim of ineffective assistance of counsel

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[60] See *Sims, supra* note 7.

and denying his motion for postconviction relief. The judgment of the district court is affirmed.

AFFIRMED.

STEVEN L. ARCHBOLD, SUCCESSOR PERSONAL REPRESENTATIVE OF THE ESTATE OF ALPHONS REIFENRATH, DECEASED, APPELLEE, V. JOSEPH F. REIFENRATH AND DONNA REIFENRATH, APPELLANTS.

744 N.W.2d 701

Filed January 25, 2008. No. S-06-1124.

1. **Equity: Appeal and Error.** In an appeal of an equity action, an appellate court tries the factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, however, that where credible evidence is in conflict on a material issue of fact, an appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
2. **Principal and Agent.** A power of attorney is an instrument in writing authorizing another to act as one's agent.
3. ____. An agent holding a power of attorney is termed an "attorney in fact" as distinguished from an attorney at law.
4. ____. An agency is a fiduciary relationship resulting from one person's manifested consent that another may act on behalf and subject to the control of the person manifesting such consent and, further, resulting from another's consent to so act.
5. ____. An agent and principal are in a fiduciary relationship such that the agent has an obligation to refrain from doing any harmful act to the principal, to act solely for the principal's benefit in all matters connected with the agency, and to adhere faithfully to the instructions of the principal, even at the expense of the agent's own interest.
6. **Agency: Principal and Agent.** Because of the agency relationship created by a power of attorney, the authority and duties of an attorney in fact are governed by the principles of the law of agency, including the prohibition against an agent profiting in transactions in which the agent represents the principal.
7. **Principal and Agent.** Powers of attorney are by necessity strictly construed, and broad encompassing grants of power are to be discounted.
8. **Prejudgment Interest: Appeal and Error.** Whether prejudgment interest should be awarded is reviewed de novo on appeal.
9. **Prejudgment Interest.** Prejudgment interest may be awarded only as provided in Neb. Rev. Stat. § 45-103.02(2) (Reissue 2004).
10. ____. Under Neb. Rev. Stat. § 45-103.02(2) (Reissue 2004), prejudgment interest is recoverable only when the claim is liquidated, that is, when there is no reasonable controversy as to the plaintiff's right to recover and the amount of such

recovery. This determination requires a two-pronged inquiry. There must be no dispute as to the amount due and to the plaintiff's right to recover.

Appeal from the District Court for Cedar County: WILLIAM BINKARD, Judge. Affirmed.

David A. Domina and Claudia L. Stringfield-Johnson, of Domina Law Group, P.C., L.L.O., for appellants.

Thomas H. DeLay, of Jewell, Collins, DeLay & Flood, for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MCCORMACK, J.

NATURE OF CASE

Steven L. Archbold, successor personal representative of the estate of Alphons Reifenrath, brought the present action against Joseph F. Reifenrath and his wife, Donna Reifenrath (collectively the appellants), to recover assets formerly belonging to Alphons. The district court found that Joseph, while acting as Alphons' power of attorney (POA), did not have authorization to make substantially gratuitous transfers of Alphons' assets to himself and members of his family. The district court further found that any oral authorization by Alphons for Joseph to make such transfers was the result of undue influence exercised by Joseph. The appellants now appeal.

BACKGROUND

Alphons was diagnosed with terminal cancer in August 2002 and died shortly thereafter on November 1, 2002. Alphons was a bachelor and was survived by one brother, Joseph; one sister, Angela Gubbels (Angela); and his nieces and nephews. Alphons was preceded in death by his parents and seven sisters, including a sister named "Beatrice Walter" (Beatrice). Alphons had lived alone on his farm for a number of years prior to his diagnosis. Following his diagnosis, however, Alphons resided in a nursing home until his death.

During his life, Alphons owned various parcels of real estate, some of which he retained in his name as sole owner and some of which he sold to Joseph. In addition, prior to September 2002, Alphons owned various bank accounts and certificates of deposit. The account number, owner, title of the account, and ending balance for the bank accounts at issue, as well as the certificate number, owner, amount, and payee or payable-on-death (POD) beneficiary for the relevant certificates of deposit are as follows:

Account No.	**Owner**	**Titled As**	**Closing Balance**
491705	Alphons	Alphons or Beatrice	$2,446.93
738536499	Alphons	Alphons or Angela	5,100.49
Certificate No.	**Owner**	**Amount**	**Payee**
15466	Alphons	$ 6,700.30	POD Angela
32064	Alphons or Beatrice	45,000.00	Survivor
15630	Alphons	65,397.53	POD Angela and Beatrice
2108332046	Alphons and Angela	50,040.75	Survivor

Angela testified by deposition that prior to his death, Alphons informed her that she was the beneficiary of a number of certificates of deposit and checking accounts and that upon his death, she was to distribute the proceeds to Alphons' estate for distribution among the siblings.

Around the time Alphons was admitted into the nursing home, Joseph contacted his attorney, Alice Rokahr, who drafted a durable POA which was signed by Alphons. Under the POA, Joseph was appointed Alphons' attorney in fact and was given plenary powers as well as all the specific and general powers set forth in the Nebraska Short Form Act (the Act), Neb. Rev. Stat. § 49-1501 et seq. (Reissue 1998). At trial, Rokahr testified, over a continuing objection by Archbold's attorney on the basis of parol evidence, that she explained to Alphons that the document would give Joseph the right to stand in Alphons' shoes, that Joseph could do anything Alphons could do, and

that "this was a full power with no limits." In admitting this testimony, the court stated:

> I'm inclined to let it come in. But as far as the fact finding of whether [Alphons'] understanding varies with what he signed, or whether I believe it, that's another matter. So I'm going to let it come in. The objection is overruled. It's going to be for the weight that I place on it.

Rokahr also prepared an updated will for Alphons, which was signed by Alphons and witnessed on September 17, 2002. Joseph was appointed personal representative of the will. In the will, Alphons directed that any property in his name and another as joint tenant or beneficiary at the time of his death be paid to such joint owner or beneficiary and that the personal representative make no claim thereto. Alphons directed that all certificates of deposit be cashed by the personal representative and be divided equally among his beneficiaries. He directed that the personal representative sell Alphons' real estate, preferably to a family member, and distribute the proceeds in equal parts to his residuary beneficiaries. Alphons also directed that his personal property be distributed as the personal representative saw fit and that his farm machinery and equipment be sold and the proceeds be equally distributed to his residuary beneficiaries. Alphons left the residue and remainder of his estate, including all cash, equally to Joseph and the children of five of his sisters.

Following his appointment as Alphons' attorney in fact, Joseph deleted the names of Alphons' sisters as joint owners or POD beneficiaries on a number of Alphons' deposit accounts and certificates of deposit, and inserted his own name as either the joint owner or POD beneficiary for nearly all those assets. Following Alphons' death, Joseph closed the two deposit accounts for which he had substituted himself as joint owner and deposited the balances into his personal accounts. The inventory filed by Joseph as personal representative identified the account balances as "Jointly Owned Property," with Joseph as the surviving joint owner. Prior to Alphons' death, Joseph also drew checks upon Alphons' deposit accounts in the amounts of $65,000, $15,000, $10,000, and $1,000. These checks were all payable to Donna.

With regard to Alphons' certificates of deposit, certificate 15466 was redeemed by Joseph in October 2002, certificate 32064 was cashed in December 2002, and certificate 2108332046 was redeemed in December 2002. The proceeds of these certificates were deposited into accounts owned by either Joseph or the appellants jointly. With regard to certificate 15466, Joseph testified that he used the proceeds from the certificate to pay his personal debt that had accumulated from working with Alphons over the years. With regard to certificate 2108332046, Joseph claimed that he used the proceeds of the certificate to pay a personal debt to reimburse expenses he had accrued while farming with Alphons.

In addition, while acting as attorney in fact, Joseph participated in the sale of Alphons' farm to Joseph's son and daughter-in-law for $115,000. Joseph testified that Alphons agreed to sell his farm to Joseph's son. Joseph drafted the deed, as well as a note for the $115,000 consideration. Joseph claimed that Alphons orally authorized the drafting of the note. The payees of the note were identified as Alphons or Joseph or Donna. The appellants received the payoff of the note in full on July 14, 2004. That amount was not paid into the estate; rather, it was used for the appellants' sole use and benefit.

Archbold, successor personal representative of Alphons' estate, filed suit against the appellants. Archbold alleged that Joseph abused his fiduciary duty as Alphons' attorney in fact by making gifts to himself and his family. Archbold alleged that the appellants wrongfully retained funds from Alphons' estate, commingled funds from Alphons or Alphons' estate, paid personal debts with those funds, and purchased property with those funds. Archbold further alleged that Joseph exercised undue influence over Alphons and that the appellants wrongfully took property from Alphons and Alphons' estate.

The principal issue before the district court was the question of whether Joseph, as attorney in fact for Alphons, was authorized to make substantial gifts of Alphons' funds to himself and his family. The district court found in part that the principles of agency apply to the construction of a POA and supplement the Act. The district court concluded that neither the POA in this case, nor the general powers and plenary power of the

Act, expressly granted Joseph the authority and power to make substantial gifts of Alphons' property and funds to himself and his family, including Donna. The district court found that there was clear and convincing evidence of constructive fraud. The district court further found that there was clear and convincing evidence of Joseph's motive and intent to unduly influence Alphons during the last days of Alphons' life. The district court found that if Alphons actually gave oral authorization for Joseph to insert his name as joint payee or POD beneficiary on the above-noted deposit accounts and certificates of deposit and authorized the drafting of the promissory note payable to Alphons and the appellants as joint tenants, such authority was the product and result of undue influence exercised by Joseph upon Alphons. The court held that the amounts taken from Alphons' deposit accounts and certificates of deposit accounts, which are noted above, should be returned to Alphons' estate, as well as the proceeds from the sale of Alphons' farm. The court found that based upon the evidence, no reasonable controversy existed as to the amount of damages or the time when the cause of action arose, i.e., the time when Joseph received the moneys and held that prejudgment interest should be assessed against the appellants.

The district court also addressed in its order the admissibility of Rokahr's testimony, which was objected to at trial on the basis of the parol evidence rule. In its order, the district court found that although the objection was overruled, if the testimony was offered as proof of the matter stated, then such expression of intent was inadmissible under the parol evidence rule.

ASSIGNMENTS OF ERROR

The appellants contend, renumbered, that the district court erred (1) in finding Joseph unduly influenced Alphons to make certain gifts or transfers of certificates of deposit, (2) in setting aside the promissory note payable to the appellants, (3) in deciding that the Act does not eliminate the need for express authority for an attorney in fact to convey assets to himself, (4) in refusing to admit Rokahr's testimony, and (5) in awarding Archbold prejudgment interest.

STANDARD OF REVIEW

[1] In an appeal of an equity action, this court tries the factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, however, that where credible evidence is in conflict on a material issue of fact, we consider and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.[1]

ANALYSIS

Joseph Was Not Authorized to Make Substantially Gratuitous Transfers of Alphons' Property to Himself and Members of His Family

The appellants' first three assignments of error can be consolidated into one broad question: Does the plenary power in the Act change the rule with regard to the fiduciary duty that an agent owes to the principal?

[2–5] We have defined a power of attorney as "'an instrument in writing authorizing another to act as one's agent.'"[2] An agent holding a power of attorney is termed an "attorney in fact" as distinguished from an attorney at law.[3] An agency is a fiduciary relationship resulting from one person's manifested consent that another may act on behalf and subject to the control of the person manifesting such consent and, further, resulting from another's consent to so act.[4] An agent and principal are in a fiduciary relationship such that the agent has an obligation to refrain from doing any harmful act to the principal, to act solely for the principal's benefit in all matters connected with the agency, and to adhere faithfully to the instructions of the principal, even at the expense of the agent's own interest.[5]

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[1] *Fletcher v. Mathew*, 233 Neb. 853, 448 N.W.2d 576 (1989).

[2] *Id.* at 858, 448 N.W.2d at 581. See, also, *First Colony Life Ins. Co. v. Gerdes*, 267 Neb. 632, 676 N.W.2d 58 (2004).

[3] *First Colony Life Ins. Co. v. Gerdes, supra* note 2; *Crosby v. Luehrs*, 266 Neb. 827, 669 N.W.2d 635 (2003).

[4] *First Colony Life Ins. Co. v. Gerdes, supra* note 2.

[5] *Id.*

[6] As stated in *Fletcher v. Mathew*,[6] because of the agency relationship created by a power of attorney, the authority and duties of an attorney in fact are governed by the principles of the law of agency, including the prohibition against an agent profiting in transactions in which the agent represents the principal. We explained in *Crosby v. Luehrs*[7] that no gift may be made by an attorney in fact to himself or herself unless the power to make such a gift is expressly granted in the instrument and there is shown a clear intent on the part of the principal to make such a gift. Thus, absent an express intention, an agent may not use his or her position for the agent's or a third party's benefit in a substantially gratuitous transfer.[8] An attorney in fact, under the duty of loyalty, always has the obligation to act in the best interest of the principal unless the principal voluntarily consents to the attorney in fact engaging in an interested transaction after full disclosure.[9]

Accordingly, we have determined that in situations involving an attorney in fact,

> a prima facie case of fraud is established if the plaintiff shows that the defendant held the principal's power of attorney that the defendant, using the power of attorney, made a gift to himself or herself. . . . The burden of going forward under such circumstances falls upon the defendant to establish by clear and convincing evidence that the transaction was made pursuant to power expressly granted in the power of attorney document and made pursuant to the clear intent of the donor.[10]

In *First Colony Life Ins. Co. v. Gerdes*,[11] we stated that in situations involving an attorney in fact, a principal's purported oral authorization is ineffective as proof of the principal's intent

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[6] *Fletcher v. Mathew, supra* note 1.

[7] *Crosby v. Luehrs, supra* note 3.

[8] *Id.*

[9] *Id.*

[10] *Id.* at 836, 669 N.W.2d at 645. See, also, *Vejraska v. Pumphrey*, 241 Neb. 321, 488 N.W.2d 514 (1992); *Fletcher v. Mathew, supra* note 1.

[11] *First Colony Life Ins. Co. v. Gerdes, supra* note 2.

to make a substantially gratuitous transfer. We explained that this rule "was enunciated out of concern for potential abuse and fraud with durable powers of attorney and has been limited in application to cases in which the attorney in fact, or someone in relationship to the attorney in fact, stood to benefit at the principal's expense."[12] The appellants rely on Alphons' alleged oral authorizations and the POA as Joseph's authority for making gifts to himself and members of his immediate family. Because Alphons' alleged oral authorizations are ineffective as proof of Alphons' intent, the POA in this case would have to provide Joseph with the express authority to make such gratuitous transfers.

The appellants contend that the POA in this case, which was patterned after the Act, conferred plenary power upon Joseph. The appellants assert that included in that power was the authority to personally acquire property from Alphons and to convey Alphons' property to any person, including Joseph and members of his family. The appellants further assert that nothing in the Act limits an attorney in fact's authority to transfer property to himself or herself or family.

[7] Powers of attorney are by necessity strictly construed, and broad encompassing grants of power are to be discounted.[13] The POA in this case provides in relevant part:

> 1. **Durability**: By this instrument, I create and establish a durable and general Power of Attorney upon the following principals:
>
> a. The authority and power within the scope of this instrument derive their validity from and compromise [sic] and constitute a durable Power of Attorney under the provisions and within the meaning of Section 30-2664 through 2672, reissue revised statutes of Nebraska, 1995, as amended, and all other applicable provisions of the Nebraska Uniform Durable Power of Attorney Act, as amended, and the Nebraska Probate Code, as amended; and the short form expressions herein used have the meanings ascribed by and are respectively subject to application,

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[12] *Id.* at 640, 676 N.W.2d at 65.

[13] *Fletcher v. Mathew, supra* note 1.

> construction, enforcement and interpretation as prescribed under the provisions of Sections 49-1501 through 1561, reissue revised statutes of Nebraska, 1998, as amended, and all other applicable provisions of the Nebraska Short Form Act. . . .
>
> 2. **Enumerated Powers**: By this instrument, I confer upon and grant to my power of attorney without limitation to the generality, Plenary Power exercisable in the absolute judgment and discretion of my Agent. This shall include, but not be limited to the following authority, to wit: . . . .

The POA goes on to specify all those general and specific powers and authorities contained in the Act. Included is the specific authority for dispositions,[14] the specific authority for documents,[15] the specific authority for investments,[16] the general power for bank and financial transactions,[17] and the general power for real estate.[18]

The Act defines a general power as "any one of the separate general aggregations of related authorities and powers defined by any short form expression specified by the . . . Act."[19] Plenary power is defined by the Act as "the general and universal aggregation of authorities and powers defined by the short form expression specified by the . . . Act."[20] The Act further provides that plenary power "shall mean that the principal generally and universally authorizes and empowers the agent to have and to exercise collectively or singly and concurrently or consecutively any one or more in combination or otherwise of each" of the general power.[21] The Act provides that plenary power shall mean that

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[14] See § 49-1532.

[15] See § 49-1533.

[16] See § 49-1537.

[17] See § 49-1545.

[18] See § 49-1554.

[19] § 49-1512.

[20] § 49-1515.

[21] § 49-1557.

> the principal generally and universally authorizes and empowers the agent to act as and to be an alter ego of the principal as to anything and everything not otherwise fully within the scope of such enumerated general powers and to the full extent permissible and practicable for any person as an agent to do or omit to do for, in place of, or on behalf of another person as a principal and without reservation or restriction as to any circumstance, condition, interest, matter, property, question, or transaction as the principal might do or omit to do in person and while competent.[22]

The appellants argue that under the plenary power bestowed upon Joseph, Joseph was expressly provided the authorization to make substantially gratuitous transfers of Alphons' property to himself and his family. The appellants misconstrue the breadth of plenary power under the Act. Section 49-1557 provides that plenary power authorizes the agent to act as the principal's alter ego. Notably, § 49-1557 limits plenary power to those acts an agent is otherwise authorized to do as an agent. As explained above, our case law on the subject has made clear that an agent is not authorized to make substantially gratuitous transfers to himself or his family absent an express provision in the POA. Because the POA in this case does not contain a specific authorization for the making of gratuitous transfers by Joseph to himself or his immediate family, we determine that Joseph has failed to meet his burden. We, therefore, affirm the district court's findings. Specifically, we determine that Joseph was not authorized to transfer the funds from Alphons' bank accounts to himself or Donna. We further determine that Joseph was not authorized to retain the proceeds from the certificates of deposit noted above. As for the real estate sold to Joseph's son, Alphons directed in his will that his real estate be sold, preferably to a family member. Joseph did that by selling the property to his son. We determine, however, that the proceeds of that sale should not have been retained by the appellants. Rather, the proceeds should have been remitted to Alphons' estate.

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[22] *Id.* (emphasis supplied).

ROKAHR'S TESTIMONY

We have examined the appellants' fourth assignment of error with regard to Rokahr's testimony, and we find this assignment of error to be without merit.

PREJUDGMENT INTEREST

[8] In their final assignment of error, the appellants contend that the district court erred in awarding prejudgment interest. Whether prejudgment interest should be awarded is reviewed de novo on appeal.[23]

[9,10] Prejudgment interest may be awarded only as provided in Neb. Rev. Stat. § 45-103.02(2) (Reissue 2004).[24] Under § 45-103.02(2), prejudgment interest is recoverable only when the claim is liquidated, that is, when there is no reasonable controversy as to the plaintiff's right to recover and the amount of such recovery. This determination requires a two-pronged inquiry. There must be no dispute as to the amount due and to the plaintiff's right to recover.[25]

The district court determined that no reasonable controversy existed as to the amount of damages. The appellants do not dispute this determination. The appellants do, however, argue that a reasonable controversy existed regarding Joseph's rights to retain Alphons' assets. We disagree. Based on our analysis above, we conclude that a reasonable controversy did not exist as to Joseph's rights to retain Alphons' assets. We, therefore, affirm the district court's judgment on this issue.

CONCLUSION

For the reasons discussed, we affirm the judgment of the district court.

AFFIRMED.

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[23] *Travelers Indemnity Co. v. International Nutrition*, 273 Neb. 943, 734 N.W.2d 719 (2007).

[24] See *id.*

[25] See *id.*

JAMES E. RISOR, APPELLEE, V. NEBRASKA BOILER, APPELLEE, AND TWIN CITY FIRE INSURANCE CO., APPELLANT.

744 N.W.2d 693

Filed January 25, 2008. No. S-07-269.

1. **Interventions.** Whether a party has the right to intervene in a proceeding is a question of law.
2. **Constitutional Law: Due Process.** The determination of whether the procedures afforded an individual comport with constitutional requirements for procedural due process presents a question of law.
3. **Workers' Compensation: Appeal and Error.** An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law.
4. **Workers' Compensation: Insurance: Parties.** The employer's workers' compensation insurer is a proper party defendant in a workers' compensation action, but it is not a necessary party to the action.
5. **Interventions.** It is a general principle that intervention is not authorized after trial.
6. **Workers' Compensation: Equity: Jurisdiction.** No Nebraska statute grants equity jurisdiction to the Workers' Compensation Court.
7. **Workers' Compensation: Intent.** The principal purpose of the Nebraska Workers' Compensation Act is to provide an injured worker with prompt relief from the adverse economic effects caused by a work-related injury or occupational disease.
8. **Due Process: Words and Phrases.** Due process defies precise definition, but it embodies and requires fundamental fairness.
9. **Due Process: Notice.** Due process requires notice and an appropriate opportunity to be heard when a significant property interest has been shown.
10. **Due Process: Judgments: Parties.** It is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefore has never had an opportunity to be heard.
11. **Actions: Parties.** Privity requires, at a minimum, a substantial identity between the issues in controversy and a showing that the parties in the two actions are really and substantially in interest the same.

Appeal from the Workers' Compensation Court. Affirmed.

Joseph W. Grant, of Hotz, Weaver, Flood, Breitkreutz & Grant, for appellant.

Brenda Spilker and Cynthia R. Lamm, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellee Nebraska Boiler.

Martin V. Linscott, of Linscott Law Office, for appellee James E. Risor.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MCCORMACK, J.

NATURE OF CASE

Twin City Fire Insurance Co. (Twin City) appeals from the denial of its motion to intervene in a workers' compensation action while the appeal to the review panel of the underlying award is pending. Although the review panel recognized that, through error, Twin City had only recently been notified of the action, it concluded that it lacked authority to grant the motion to intervene.

BACKGROUND

James E. Risor filed his petition in the Nebraska Workers' Compensation Court on January 20, 2004. Risor alleged bilateral hearing loss from exposure to a loud work environment at his employer, Nebraska Boiler. The accident date for the hearing loss was alleged to be on or about June 25, 2002. The petition also claimed various other injuries from work-related accidents in 2002 and 2003.

In the proceedings before the single judge of the compensation court, Fireman's Fund Insurance Company (Fireman's Fund) entered an appearance for Nebraska Boiler for the coverage period of September 1, 1992, through June 1, 2002. Another insurance company represented Nebraska Boiler for the period after June 2002. The evidence presented before the single judge demonstrated that Risor began experiencing hearing loss as early as 1988. Until his retirement, however, the only time that Risor missed any work due to the bilateral hearing loss was when he went to a doctor's appointment on October 19, 1993.

In its award entered on April 26, 2006, the single judge concluded that Risor was permanently and totally disabled as a result of the hearing loss arising out of and in the course of his employment with Nebraska Boiler. The accident date for the hearing loss was determined to be October 19, 1993. The single judge found that compensation for the other alleged injuries had already been paid. Payment for the total permanent disability was ordered to begin as of the date of Risor's retirement, February 12, 2004.

An adjuster for Fireman's Fund was sent notice of the award. This same adjuster had originally informed Fireman's Fund's attorney, who was hired to represent Nebraska Boiler, that Fireman's Fund provided workers' compensation coverage for Nebraska Boiler from September 1, 1992, through June 1, 2002. But when the adjuster was notified of the award setting the date of the hearing loss injury at October 19, 1993, she decided to investigate further into the dates of coverage.

Fireman's Fund provided coverage for Nebraska Boiler under a corporate account with the company Aqua Chem, in which any subsidiary companies acquired by Aqua Chem automatically became "additional named insureds." Nebraska Boiler was owned by Aqua Chem at the time Risor's claim was filed. The adjuster had apparently assumed that Nebraska Boiler was owned by Aqua Chem during the entire period of Aqua Chem's contract with Fireman's Fund. After the award, the adjuster discovered that, in fact, Aqua Chem did not acquire Nebraska Boiler until June 23, 1998. Accordingly, contrary to its representations to the single judge, Fireman's Fund was not Nebraska Boiler's workers' compensation insurer on the date of Risor's hearing loss injury.

The award had already been entered when Nebraska Boiler learned that Fireman's Fund was not its insurer on the date of Risor's injury. Nevertheless, Nebraska Boiler, "as its interests appear through June 1, 2002," filed a motion with the single judge seeking a continuation of the proceedings and allowing that "additional parties who may have an exposure to liability once a final determination has been made" be served and given an opportunity to present additional evidence to the court. Risor appealed the award to the review panel on May 9, 2006, on the ground that the single judge had failed to order compensation from the date of his injury, as opposed to the date of his retirement. On May 10, the single judge overruled Nebraska Boiler's motion, and Nebraska Boiler cross-appealed the underlying award to the review panel. Nebraska Boiler's cross-appeal asserted various errors with the award, including the absence of participation by the insurer for the time period of the accident. Risor's appeal and Nebraska Boiler's cross-appeal of the award

are still pending before the review panel and are not at issue in this appeal.

It was eventually discovered that Nebraska Boiler's insurer for the period of August 1, 1991, to August 1, 1998, was Twin City. Twin City insured Nebraska Boiler through a contract with its previous parent company, National Dynamics Corporation. Twin City was informed of Risor's claim on August 1, 2006. On October 25, 2006, Twin City filed with the review panel a motion for leave to intervene in Risor's pending review proceeding, which is the subject of the present appeal. The motion stated in part:

> 4. If allowed to intervene, [Twin City] will seek a reversal of the Award of April 26, 2006, and a remand for a new trial. If [Twin City] is not given an opportunity to intervene, fundamental principles of law will be violated, in that it will face significant exposure under the Nebraska Workers' Compensation Act, without having had the opportunity to even be heard on the issues herein.
>
> 5. [Twin City] respectfully notes that its insured has at all times been the only named Defendant herein, and that perhaps [Twin City] could simply have its counsel enter an appearance herein. However, as [Twin City] has not participated in this action to date in any way, this Motion is being filed to seek to have [Twin City's] right to participate in any further proceedings recognized.

The review panel denied Twin City's motion to intervene, noting that there was no statutory authority for such action and that the compensation court lacked equitable powers. Twin City appeals.

ASSIGNMENT OF ERROR

Twin City asserts that the review panel erred as a matter of law in refusing to grant Twin City's request for leave to intervene.

STANDARD OF REVIEW

[1-3] Whether a party has the right to intervene in a proceeding is a question of law.[1] The determination of whether the

[1] *Merz v. Seeba*, 271 Neb. 117, 710 N.W.2d 91 (2006).

procedures afforded an individual comport with constitutional requirements for procedural due process presents a question of law.[2] An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law.[3]

ANALYSIS

The only issue in this case is whether Twin City had a right to intervene in the appeal of the award to the review panel when Twin City had no notice of Risor's action prior to that time. For reasons that will be explained further below, we conclude that Twin City did not have a right to postaward intervention in Risor's workers' compensation action brought solely against his employer, Nebraska Boiler.

[4] We have said that the employer's workers' compensation insurer is a proper party defendant in a workers' compensation action, but that it is not a necessary party to the action.[4] Both the Nebraska Workers' Compensation Act (the Act)[5] and the rules of the compensation court are silent on the issue of intervention. And, as Risor points out, the compensation court is a tribunal of limited and special jurisdiction and has only such authority as has been conferred on it by statute.[6]

Twin City, however, argues that the power to allow its intervention should be inferred from § 48-168(1) and the beneficent purposes of the Act.[7] Most often, § 48-168(1) is cited for the proposition that within the confines of the Due Process Clause, the compensation court has flexibility in the admission and

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[2] *Newman v. Rehr*, 263 Neb. 111, 638 N.W.2d 863 (2002).

[3] *Foster v. BryanLGH Med. Ctr. East*, 272 Neb. 918, 725 N.W.2d 839 (2007).

[4] *Peek v. Ayers Auto Supply*, 157 Neb. 363, 59 N.W.2d 564 (1953).

[5] Neb. Rev. Stat. §§ 48-101 to 48-1,117 (Reissue 2004 & Cum. Supp. 2006).

[6] See *Anthony v. Pre-Fab Transit Co.*, 239 Neb. 404, 476 N.W.2d 559 (1991).

[7] See § 48-168(1).

consideration of evidence relating to the employee claim.[8] This is clearly the focus of § 48-168(1), which states in full:

> The Nebraska Workers' Compensation Court shall not be bound by the usual common-law or statutory rules of evidence or by any technical or formal rules of procedure, other than as herein provided, but may make the investigation in such manner as in its judgment is best calculated to ascertain the substantial rights of the parties and to carry out justly the spirit of the Nebraska Workers' Compensation Act.

Nevertheless, Twin City points out that the Act is generally to be given a liberal construction in order to carry out justly its beneficent purposes.[9] And thus, Twin City argues that § 48-168(1) should be construed to allow postaward intervention by an insurer despite the fact that no other provision specifically grants this power.

[5,6] We are unconvinced that either § 48-168(1) or the Act's beneficent purposes, either alone or in conjunction with one another, authorize a postaward intervention of the insurer in this case. It is a general principle that intervention is not authorized after trial.[10] When posttrial intervention has been authorized in the district courts of Nebraska, it is in the exercise of the court's equity jurisdiction.[11] But no Nebraska statute grants equity jurisdiction to the compensation court.[12]

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[8] See, e.g., *Olivotto v. DeMarco Bros. Co.*, 273 Neb. 672, 732 N.W.2d 354 (2007); *Veatch v. American Tool*, 267 Neb. 711, 676 N.W.2d 730 (2004); *Cunningham v. Leisure Inn*, 253 Neb. 741, 573 N.W.2d 412 (1998); *Sheridan v. Catering Mgmt., Inc.*, 252 Neb. 825, 566 N.W.2d 110 (1997); *Paulsen v. State*, 249 Neb. 112, 541 N.W.2d 636 (1996).

[9] See, *Soto v. State*, 269 Neb. 337, 693 N.W.2d 491 (2005); *Jackson v. Morris Communications Corp.*, 265 Neb. 423, 657 N.W.2d 634 (2003); *Foote v. O'Neill Packing*, 262 Neb. 467, 632 N.W.2d 313 (2001).

[10] See Neb. Rev. Stat. § 25-328 (Cum. Supp. 2006). See, also, e.g., *Diaz v. Attorney General of State of Tex.*, 827 S.W.2d 19 (Tex. App. 1992); *Jenkins v. Pullman Std. Car Mfg. Co.*, 128 Ind. App. 260, 147 N.E.2d 912 (1958).

[11] See, e.g., *State ex rel. City of Grand Island v. Tillman*, 174 Neb. 23, 115 N.W.2d 796 (1962). See, also, *Meister v. Meister, ante* p. 705, 742 N.W.2d 746 (2007).

[12] *Anthony v. Pre-Fab Transit Co., supra* note 6.

[7] The beneficent purposes of the Act do not concern themselves with an insurer's interests in intervention. In fact, there is no provision in the Act that even requires notification of the workers' compensation insurer that an action against its insured is pending. The principal purpose of the Act is to provide an injured worker with prompt relief from the adverse economic effects caused by a work-related injury or occupational disease.[13] That purpose is not implicated by an insurer's intervention in a review proceeding.

Still, Twin City argues that it is this interest of the employee that is furthered by its intervention because, otherwise, a potential multiplicity of suits could delay recovery on an award. This same argument was rejected by the court in *Milner v. 250 Greenwood Ave. Corp.*[14] In *Milner*, the employee brought his workers' compensation action against his employer and did not implead the employer's insurer. The insurer then sought to be designated as a party on appeal, arguing that this would avoid circuity and multiplicity of actions. But the court explained that the employee had chosen not to make the insurer a party in order to avoid complicating and prolonging a judgment against his employer:

> [I]t is clear that the only issue properly before [the workers' compensation court] was the liability of the employing corporation as the sole respondent. Under the petition as drawn and prosecuted petitioner's purpose in instituting these proceedings was to establish his right under the provisions of the act to recover compensation *directly from the employer.* For the attainment of that end it was immaterial to him who, as between the employer and its insurer or insurers, was ultimately chargeable with the payment of compensation for his incapacity. In such a situation it would be an unreasonable burden to impose upon him the necessity of foregoing [sic] the protection of the act until it was finally decided whether one or the other of respondent's insurers, who were not parties

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[13] See, *Soto v. State, supra* note 9; *Jackson v. Morris Communications Corp., supra* note 9.

[14] *Milner v. 250 Greenwood Ave. Corp.*, 78 R.I. 5, 78 A.2d 358 (1951).

in the case, was ultimately chargeable with the payment of compensation.[15]

We have said that proceedings under the Act are designed to furnish a special proceeding, summary and speedy in its nature, and for the particular purpose of compensating an injured employee.[16] While, under § 48-161, the compensation court *may* determine the existence of insurance, such jurisdiction is not exclusive.[17] We agree with the reasoning in *Milner* that joining an insurer and deciding coverage disputes may hinder rather than further the beneficent purposes of the Act. As such, we cannot interpret § 48-161 as authority for postaward intervention when the employee has chosen to bring a claim against the employer alone.

[8-10] We next consider Twin City's argument that principles of procedural due process mandate its participation in the compensation proceedings. We have said that the concept of due process defies precise definition, but that it embodies and requires fundamental fairness.[18] Due process requires notice and an appropriate opportunity to be heard when a significant property interest has been shown.[19] The U.S. Supreme Court has stated, "It is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefore has never had an opportunity to be heard."[20]

Section 48-146(3) provides that each workers' compensation policy shall contain a clause providing that the insurer "shall in all things be bound by the awards, judgments, or decrees rendered against such insured." And we have explained that this section's intent is to bind insurers to judgments rendered against

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[15] *Id.* at 10, 78 A.2d at 361 (emphasis in original).

[16] *Hull v. United States Fidelity & Guaranty Co.*, 102 Neb. 246, 166 N.W. 628 (1918).

[17] See *Schweitzer v. American Nat. Red Cross*, 256 Neb. 350, 591 N.W.2d 524 (1999).

[18] See *Zahl v. Zahl*, 273 Neb. 1043, 736 N.W.2d 365 (2007).

[19] *Newman v. Rehr, supra* note 2.

[20] *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327 n.7, 99 S. Ct. 645, 58 L. Ed. 2d 552 (1979).

their insureds.[21] We thus agree that Twin City's interests may be affected by the proceedings against its insured, Nebraska Boiler. Nevertheless, we conclude that because Nebraska Boiler and Twin City are in privity with one another, due process does not compel Twin City's intervention in the review proceedings.

[11] Privity requires, at a minimum, a substantial identity between the issues in controversy and a showing that the parties in the two actions are really and substantially in interest the same.[22] Absent a showing of fraud or collusion, courts in other jurisdictions have found insurers to be in privity with their insureds and bound by a judgment against the insured, regardless of whether the insurer was notified of the underlying action.[23] Thus, in *Harp v. Loux*,[24] the court rejected a defendant insurer's argument that due process demanded that a default judgment in a tort action against the defendant be set aside because the insurer was not notified of the action. The court explained:

> The difficulty with [the defendant insurer's] argument is that the insurer's legal interest in the action is wholly derivative of the defendant's . . . . It may be true that, in fact, the insurer's money and not the defendant's is on the table; however, the judgment runs against the defendant and not the insurer.[25]

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[21] *Thomas v. Omega Re-Bar, Inc.*, 234 Neb. 449, 451 N.W.2d 396 (1990); *Collins v. Casualty Reciprocal Exchange*, 123 Neb. 227, 242 N.W. 457 (1932); *Home Indem. Co. v. King*, 34 Cal. 3d 803, 670 P.2d 340, 195 Cal. Rptr. 686 (1983); *Bernard v. Aetna Ins. Co.*, 150 So. 305 (La. App. 1933); *Power Co. v. General C. & S. Co.*, 252 Mich. 331, 233 N.W. 333 (1930); *Equitable Underwriters v. Industrial Com.*, 322 Ill. 462, 153 N.E. 685 (1926).

[22] *R.W. v. Schrein*, 263 Neb. 708, 642 N.W.2d 505 (2002).

[23] See, *Crist v. Hunan Palace, Inc.*, 277 Kan. 706, 89 P.3d 573 (2004); *Cincinnati Ins. Co. v. MacLeod*, 259 Ga. App. 761, 577 S.E.2d 799 (2003); *Liberty Mut. Ins. Co. v. Eades*, 248 Va. 285, 448 S.E.2d 631 (1994). Cf., *R.W. v. Schrein, supra* note 22; *Northern Sec. Ins. Co., Inc. v. Dolley*, 669 A.2d 1320 (Me. 1996).

[24] *Harp v. Loux*, 54 Or. App. 840, 636 P.2d 976 (1981).

[25] *Id.* at 848, 636 P.2d at 981 (emphasis omitted).

Moreover, the court explained, insurers normally include notice provisions in their contracts with the insureds, and it was "not readily apparent why a plaintiff injured by an insured should be required to protect the insurer from the consequences of the insured's failure to comply with the policy."[26] The court noted that the defendant could find "no case holding that an insurer that is not a party has a due process right to service or notice of an action in which its insured is a defendant."[27] Similar reasoning has been applied more specifically to due process claims of workers' compensation insurers—even when the insurer was required to maintain policy provisions like those set forth by § 48-146(3).[28]

In the case currently before us, Fireman's Fund believed, albeit incorrectly, that it was Nebraska Boiler's insurer during the period in which the court ultimately determined Risor was injured. Fireman's Fund, representing Nebraska Boiler, vigorously defended against Risor's claim. Twin City fails to make any argument that there was fraud or collusion against it. Rather, the evidence is that Nebraska Boiler's interests, represented by attorneys provided by Fireman's Fund, were substantially the same as Twin City's. As such, we do not find a violation of Twin City's right to procedural due process from the fact that Twin City was not notified of Risor's action against Nebraska Boiler and was not made a party to the proceedings before the review panel.

Whether indemnification or any other remedy is available to Twin City is not before us in this appeal. But Risor, who was under no obligation to join insurers in his action against Nebraska Boiler, should not now have to wait for the resolution of insurance policy and other disputes regarding coverage to establish his award for workers' compensation.

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[26] *Id.* at 849, 636 P.2d at 981.

[27] *Id.* at 850, 636 P.2d at 982.

[28] See, *Lott-Edwards v. Americold Corp.*, 27 Kan. App. 2d 689, 6 P.3d 947 (2000); *Home Indem. Co. v. King, supra* note 21; *Fidelity & Casualty Co. v. Vantaggi*, 309 Mich. 633, 16 N.W.2d 101 (1944); *Bernard v. Aetna Ins. Co., supra* note 21; *Equitable Underwriters v. Industrial Com., supra* note 21.

To the extent that Twin City is complaining of a due process violation because the date of the injury found by the single judge was not a date alleged in Risor's pleadings, that issue is more properly the subject of an appeal on the merits. We are uncertain how that alleged deficiency is relevant to intervention. Moreover, we find that Twin City and Nebraska Boiler's interests in any controversy on this issue are substantially similar. Thus, this complaint likewise fails to call for Twin City's intervention in its own behalf. Twin City would be free to represent the interests of its insured, Nebraska Boiler, in the appeal of the award to the review panel, if it so chooses.

As a practical matter, an insurer is notified of the proceedings against an insured because the insured would have an interest in its insurer's providing representation in the insured's behalf, and because the failure to provide such notice would be a breach of its policy with the insurer. Thus, normally, the insurer's representatives participate in the workers' compensation action, even though the insurer may not be a party. And the date of the injury is usually not a surprise to the parties of the action, including, as alleged in this case, the employee himself. Thus, we recognize that the circumstances surrounding Twin City's request for intervention are unique. Nevertheless, there is no statutory or constitutional authority for allowing Twin City to intervene in a review proceeding. The review panel was correct in denying Twin City's motion to intervene.

CONCLUSION

For the foregoing reasons, we affirm the judgment below.

AFFIRMED.

DAVID J. ANDERSON, APPELLEE, V. ROBERT HOUSTON, DIRECTOR, NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES, APPELLANT.

744 N.W.2d 410

Filed February 1, 2008. Nos. S-05-1561, S-06-206.

1. **Judgments: Jurisdiction: Appeal and Error.** A jurisdictional question that does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision.

2. **Habeas Corpus: Appeal and Error.** On appeal of a habeas petition, an appellate court reviews the trial court's factual findings for clear error and its conclusions of law de novo.
3. **Jurisdiction: Appeal and Error.** If the court from which an appeal was taken lacked jurisdiction, the appellate court acquires no jurisdiction.
4. **Jurisdiction: Venue: Waiver.** Litigants cannot confer subject matter jurisdiction upon a tribunal by acquiescence or consent. In contrast, venue provisions confer a personal privilege which may be waived by the defendant.
5. **Habeas Corpus.** An application for habeas relief may be made to any one of the judges of the district court or to any county judge.
6. **Habeas Corpus: Jurisdiction.** An application for a writ of habeas corpus to release a prisoner confined under sentence of court must be brought in the county where the prisoner is confined. And where proceedings are instituted in another county, it is the duty of the court, on objection to its jurisdiction, to dismiss the proceedings.
7. ____: ____. Where application is made for a writ of habeas corpus to the district court of a county other than that in which the prisoner is confined and the officer in whose custody the prisoner is held brings the latter into court and submits to the jurisdiction without objection, the prisoner is then under confinement in the county where the action is brought, and the court has authority to inquire into the legality of his or her restraint.
8. **Habeas Corpus.** The habeas corpus writ provides illegally detained prisoners with a mechanism for challenging the legality of a custodial deprivation of liberty.
9. **Habeas Corpus: Proof.** To secure habeas corpus relief, the prisoner must show that he or she is being illegally detained and is entitled to the benefits of the writ.
10. **Sentences: Equity.** Credit for time erroneously at liberty is an equitable doctrine and should be applied only where equity demands its application.
11. ____: ____. No equitable relief is required where a prisoner causes his or her own premature release from prison, thwarts governmental attempts at recapture, or misbehaves while at liberty.
12. ____: ____. Where it is clear that a prisoner had knowledge of a government mistake and made no effort to correct it, equity does not demand credit for time at liberty.
13. ____: ____. Prisoners who had knowledge of a governmental mistake and yet made no effort to correct it—like prisoners who actively cause or prolong a premature release or commit crimes while at liberty—do not deserve sentence credit under the equitable doctrine.
14. **Sentences: Notice.** To preserve the right to credit for time spent at liberty, a prisoner who knows his or her release is erroneous must make a reasonable attempt to notify authorities of the mistake.
15. ____: ____. Although the prisoner need not continue to badger the authorities, a reasonable attempt may well include voicing an objection at the time of release or contacting authorities a short time later in order to clarify his or her status.
16. **Sentences: Proof.** The prisoner carries the burden to show that the complexity in calculating his or her release date, or some cognitive deficiency, prevented him or her from realizing the release was premature. The government has what essentially

amounts to a burden of production to provide the prisoner with any and all records relevant to this inquiry. Such records would include any copies of the original sentencing order, as well as any records related to earned release time, work release, commutations, and any other such materials.

17. **Jurisdiction: Final Orders: Appeal and Error.** A trial court is divested of jurisdiction when a party perfects appeal of a final order.
18. **Habeas Corpus: Final Orders: Proof.** The test of finality for the purpose of an appeal in a habeas corpus proceeding is not necessarily whether the whole matter involved in the action is concluded, but whether the particular proceeding or action is terminated by the judgment.
19. **Habeas Corpus: Final Orders.** An order denying habeas corpus relief qualifies as a final order.
20. ____: ____. An order granting habeas corpus relief qualifies as a final order.

Appeals from the District Court for Douglas County: MARLON A. POLK, Judge. Judgment in No. S-05-1561 reversed, and cause remanded for further proceedings. Judgment in No. S-06-206 vacated.

Jon Bruning, Attorney General, Kimberley Taylor-Riley, and Ryan Gilbride for appellant.

Michael D. Nelson and Cathy R. Saathoff, of Nelson Law, L.L.C., and April L. O'Loughlin, of O'Loughlin Law, P.C., for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

HEAVICAN, C.J.

I. INTRODUCTION

David J. Anderson, an inmate at the Nebraska State Penitentiary in Lancaster County, filed a writ of habeas corpus in the district court for Douglas County. In his writ, Anderson requested sentence credit for time he spent at liberty after the Nebraska Department of Correctional Services (Department) mistakenly released Anderson long before his sentences were to expire. After concluding that it had jurisdiction over the matter, the district court granted Anderson's writ. The Department appealed and also filed a petition to bypass the Nebraska Court of Appeals, which we granted. We reverse, and remand for reasons set forth below. We also vacate the district court's orders for related legal fees and costs.

II. BACKGROUND

Anderson was convicted in Douglas County District Court of a Class III felony, theft by unlawful taking, and a Class IV felony, theft by unlawful taking. The court sentenced Anderson to 3 to 5 years' imprisonment for the Class III felony and 20 months' to 5 years' imprisonment for the Class IV felony. The court ordered the sentences to run concurrently.

On July 8, 2003, the Department mistakenly released Anderson from incarceration a mere 3 months into his sentence. If Anderson had remained in custody, he would have been eligible for parole on July 14, 2004, with a mandatory release date of July 14, 2005. The Department eventually discovered its mistake and, on September 16, 2003, filed a motion for capias and notice of hearing in the Douglas County District Court. The record is unclear, however, whether notice of this hearing was sent to Anderson, nor is it clear whether he received it. Anderson claims he did not receive the notice. Either way, Anderson did not appear at the hearing scheduled for September 24. That same day, the district court issued an order directing any law enforcement officers to arrest Anderson if they located him. Although the record does not explain why, the clerk's office did not issue that warrant for approximately 14 months.

In the interim, however, Douglas County filed a motion for declaration of forfeiture of Anderson's bail bond for the reason that Anderson failed to appear at the September 24, 2003, hearing. This motion, which was filed on March 17, 2004, and an accompanying letter were mailed to Anderson at an address specified in the certificate of service. Had Anderson received these documents, he certainly would have had reason to believe that something was amiss with his status as a released prisoner. It is not clear, however, where the county obtained that address or whether the address was, in fact, accurate. On March 26, the court entered a default judgment forfeiting Anderson's bond.

On January 3, 2005, a little more than 9 months after the bond forfeiture proceeding, police arrested Anderson during a routine traffic stop. Anderson was then returned to the Nebraska State Penitentiary in Lancaster County. After accounting for the time Anderson was absent from prison, the Department found that his

recalculated parole eligibility date was January 9, 2006, and that his new mandatory release date was January 9, 2007.

Anderson then filed a writ of habeas corpus in Douglas County District Court. At the initial hearing, the Department waived any objection to jurisdiction in Douglas County. Anderson was then transported from the state penitentiary to the Douglas County Correctional Center by the Douglas County sheriff. Sometime later, however, the Department attempted to quash Anderson's habeas corpus petition on the ground that the Douglas County District Court lacked subject matter jurisdiction. After an evidentiary hearing, the district court concluded that it had jurisdiction. This conclusion was based on *Gillard v. Clark*,[1] which the district court read as standing for the proposition that jurisdiction in habeas proceedings can effectively be transferred from one county to another. The district court noted that the Department waived jurisdiction at the initial hearing and therefore concluded that jurisdiction was proper in Douglas County.

The court then held an evidentiary hearing to address the merits of Anderson's underlying habeas claim. Here, the court cited our decision in *State v. Texel*,[2] in which we held that prisoners must serve their sentences continuously and therefore may not consent to serving sentences intermittently. As a result, the court granted Anderson's writ. In response, the Department filed a notice of appeal, our case No. S-05-1561.

Shortly thereafter, the district court entered two additional orders. In its first order, filed on January 20, 2006, the court granted Anderson's request that the Department pay court costs. Then, in an order filed on February 10, 2006, the court permitted Anderson to withdraw his request that the Department pay his legal fees. The Department appealed these orders, our case No. S-06-206, and filed a petition to bypass the Court of Appeals. We consolidated both appeals for our review.

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[1] *Gillard v. Clark*, 105 Neb. 84, 179 N.W. 396 (1920).

[2] *State v. Texel*, 230 Neb. 810, 433 N.W.2d 541 (1989).

III. ASSIGNMENTS OF ERROR

On appeal, the Department assigns that the district court erred by (1) finding that it had subject matter jurisdiction over Anderson's habeas petition, (2) granting habeas corpus relief to Anderson, and (3) entering the January 20 and February 10, 2006, orders after the Department perfected its initial appeal.

IV. STANDARD OF REVIEW

[1] A jurisdictional question that does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision.[3]

[2] It appears that Nebraska case law has not yet expressly identified the exact standard of review on appeal of a habeas petition. Drawing insight from other jurisdictions, we hold that on appeal of a habeas petition, an appellate court reviews the trial court's factual findings for clear error and its conclusions of law de novo.[4]

V. ANALYSIS

We think it prudent to address the arguments in the order in which they were presented to us. Accordingly, we begin our analysis by addressing whether the district court had jurisdiction and then consider the Department's claim that Anderson was not entitled to habeas relief. We conclude our analysis by addressing the orders of the district court issued after the Department's notice of appeal.

1. Jurisdictional Question

[3] The Department claims that the district court for Douglas County did not have subject matter jurisdiction over Anderson's habeas petition because Anderson was confined in Lancaster County. It is well established that if the court from which an appeal was taken lacked jurisdiction, the appellate court acquires no jurisdiction.[5] Thus, if the district court lacked jurisdiction to

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[3] *State v. Loyd*, 269 Neb. 762, 696 N.W.2d 860 (2005).

[4] See *Garcia v. Mathes*, 474 F.3d 1014 (8th Cir. 2007).

[5] *State v. Jacques*, 253 Neb. 247, 570 N.W.2d 331 (1997).

entertain Anderson's habeas petition, we, too, would have no jurisdiction to review the merits of Anderson's petition.

[4] Before we proceed to the substance of the jurisdictional issue, we pause to note our belief that the Department may have misspoken when it fashioned its argument. The argument that the case should have been brought in the district court for Lancaster County as opposed to the district court for Douglas County is perhaps a challenge to venue rather than subject matter jurisdiction. The difference is significant. For one, litigants cannot confer subject matter jurisdiction upon a tribunal by acquiescence or consent.[6] In contrast, venue provisions confer a personal privilege which may be waived by the defendant.[7]

[5] In addition, we think it clear that the Douglas County District Court had subject matter jurisdiction in this case. Under Nebraska law, an application for habeas relief may be made to "*any* one of the judges of the district court, or to any county judge."[8] Because "any" district judge obviously includes the district court for Douglas County, it is beyond dispute that the district court for Douglas County had subject matter jurisdiction over Anderson's habeas claim.

[6] But while the above language makes clear that any and all district courts in Nebraska have subject matter jurisdiction over habeas claims, it does not identify *which county's* district courts may hear habeas claims. This issue—essentially a question of venue—is the issue which lies at the heart of the Department's argument. To resolve that question, we turn to *Gillard*,[9] in which this court held that

> an application for a writ of habeas corpus to release a prisoner confined under sentence of court must be brought in the county where the prisoner is confined. [Citation omitted.] And where proceedings are instituted in another

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[6] *Muir v. Nebraska Dept. of Motor Vehicles*, 260 Neb. 450, 618 N.W.2d 444 (2000) (citing *Hagelstein v. Swift-Eckrich*, 257 Neb. 312, 597 N.W.2d 394 (1999)).

[7] *Id.*

[8] Neb. Rev. Stat. § 29-2801 (Reissue 1995) (emphasis supplied).

[9] *Gillard, supra* note 1, 105 Neb. at 87, 179 N.W. at 398. See, also, *Addison v. Parratt*, 204 Neb. 656, 284 N.W.2d 574 (1979).

> county, it is the duty of the court, on objection to its jurisdiction, to dismiss the proceedings.

Relying on *Gillard*, the Department points out that Anderson was confined in the Nebraska State Penitentiary in Lancaster County, yet sought habeas relief in the district court for Douglas County. In effect, the Department appears to suggest that the district court for Douglas County was not the proper venue to litigate the merits of Anderson's habeas claim.

[7] While the Department would be correct under *Gillard*'s general rule, other language in *Gillard* provided for a narrow exception:

> [W]here application is made for a writ of habeas corpus to the d[i]strict court of a county other than that in which the prisoner is confined, and the officer in whose custody the prisoner is held brings the latter into court and submits to the jurisdiction without objection, the prisoner is then under confinement in the county where the action is brought, and the court has authority to inquire into the legality of his restraint.[10]

We believe this exception applies here. Although Anderson filed his habeas petition in Douglas County—a county other than the one in which he was confined—Anderson was later transferred to the Douglas County Correctional Center. Moreover, the Department submitted to the court's "jurisdiction" at the initial hearing by failing to object to venue in Douglas County. As such, Anderson was under confinement in Douglas County. The Douglas County District Court therefore had authority to consider the legality of Anderson's restraint.

2. Anderson's Claim for Habeas Relief

[8,9] Having resolved that the district court had jurisdiction over Anderson's habeas claim, we turn now to address the merits of the habeas claim itself. The habeas corpus writ provides illegally detained prisoners with a mechanism for challenging the legality of a custodial deprivation of liberty.[11] To secure habeas corpus relief, the prisoner must show that he

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[10] *Gillard, supra* note 1, 105 Neb. at 87, 179 N.W. at 398.

[11] See *Tyler v. Houston*, 273 Neb. 100, 728 N.W.2d 549 (2007).

or she is being illegally detained and is entitled to the benefits of the writ.[12]

Anderson argues that he is entitled to day-for-day credit toward his sentence for the time that he, an erroneously released prisoner, spent at liberty. Anderson essentially believes that his sentence continued to run from July 8, 2003, the date of erroneous release, to January 3, 2005, the date he was picked up by officers, as though he were in prison the entire time. Therefore, Anderson believes the Department was obligated to release him no later than July 14, 2005, the date his sentence was originally set to expire, and that detaining him beyond that date was illegal.[13]

In making this argument, Anderson invokes a line of cases under which erroneously released prisoners received sentence credit based on the belief that prematurely releasing and then reincarcerating a prisoner impermissibly interferes with the prisoner's right to expeditiously pay his or her debt to society.[14] We review this authority immediately below, then address what impact it may have on the present case in a subsequent section.

(a) Theories Permitting Relief to Prematurely Released Prisoners

As set forth in the seminal case of *White v. Pearlman*,[15] a prisoner's "chance to re-establish himself and live down his past" is frustrated if the prisoner is prevented from serving his sentence continuously. This is because "a prisoner sentenced to five years might be released in a year; picked up a year later to serve three months, and so on ad libitum, with the result that he is left without even a hope of beating his way back."[16] Therefore, on the theory that the government should not be "permitted to

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[12] See *id.*

[13] See *Piercy v. Parratt*, 202 Neb. 102, 273 N.W.2d 689 (1979).

[14] See, *In re Roach*, 150 Wash. 2d 29, 74 P.3d 134 (2003) (collecting cases); Gabriel J. Chin, *Getting out of Jail Free: Sentence Credit for Periods of Mistaken Liberty*, 45 Cath. U. L. Rev. 403 (1996) (same).

[15] *White v. Pearlman*, 42 F.2d 788, 789 (10th Cir. 1930).

[16] *Id.*

play cat and mouse with the prisoner, delaying indefinitely the expiation of his debt to society and his reintegration into the free community,"[17] numerous courts now employ various remedies in cases involving interrupted sentences.

Specifically, courts have developed three distinct theories for granting relief to a prematurely released prisoner.[18] The first theory is based on notions of due process and is often called the "waiver-of-jurisdiction theory."[19] It appears that courts apply the waiver-of-jurisdiction theory when the premature release resulted from gross negligence by prison officials and lasted "a long period of time."[20] In such cases, the government is said to have waived its right to reincarcerate the prisoner and thus the remedy is a complete exoneration of the prisoner's sentence.[21] The rationale is that it would be "unequivocally inconsistent with 'fundamental principles of liberty and justice' to require a legal sentence to be served" after such an interruption.[22]

The second theory, devised by the Ninth Circuit, is known as the "estoppel theory" and is also rooted in notions of due process.[23] Under this theory, the government is estopped from reincarcerating the prisoner when a particular set of circumstances are present. Essentially, those circumstances arise when (1) the government knew the facts surrounding the release, (2) the government intended that the prisoner would rely upon its actions or acted in such a manner that the prisoner had a right to rely on them, (3) the prisoner was ignorant of the facts, and (4) the prisoner relied on the government's actions to his or her detriment.[24]

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[17] *Dunne v. Keohane*, 14 F.3d 335, 336 (7th Cir. 1994).

[18] See, *Tyler, supra* note 11; *In re Roach, supra* note 14.

[19] *Schwichtenberg v. ADOC*, 190 Ariz. 574, 577, 951 P.2d 449, 452 (1997).

[20] *In re Roach, supra* note 14, 150 Wash. 2d at 34, 74 P.3d at 137. See, also, *Schwichtenberg, supra* note 19.

[21] *In re Roach, supra* note 14; *Schwichtenberg, supra* note 19.

[22] *Green v. Christiansen*, 732 F.2d 1397, 1399 (9th Cir. 1984).

[23] *U.S. v. Martinez*, 837 F.2d 861, 865 (9th Cir. 1988). Accord *Schwichtenberg, supra* note 19 (citing *Martinez, supra*).

[24] *Green, supra* note 22.

Notably, a prisoner who knew that his or her release was erroneous cannot claim to have been "ignorant of the facts" and therefore cannot invoke the estoppel theory.[25] Further, because the estoppel theory is rooted in due process, and because a due process challenge to executive action requires behavior that is "egregious [and] outrageous,"[26] the estoppel theory requires some affirmative misconduct by authorities.[27]

The third and final remedy courts use in interrupted-detention cases is to grant a prisoner day-for-day credit for the time spent at liberty.[28] However, numerous federal appellate courts have held that the Due Process Clause does not require credit for the time spent at liberty in cases of an interrupted sentence.[29] Instead, credit for time spent at liberty is a common-law doctrine rooted in equity and is often called the "equitable doctrine."[30] In contrast to the waiver-of-jurisdiction or estoppel theories, a prisoner is eligible for credit under the equitable doctrine when the premature release is due to simple negligence by officials.[31]

By asking for day-for-day credit toward his sentence, Anderson relies solely on the equitable doctrine of credit for time spent at liberty. He does not advance an argument under the waiver-of-jurisdiction or estoppel theories, nor do we find evidence in the record suggesting that the Department committed misconduct rising to the level of a due process violation when it prematurely released Anderson. As such, today's decision focuses solely on whether Anderson is entitled to credit for time spent at liberty under the equitable doctrine.

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[25] *Martinez, supra* note 23, 837 F.2d at 865.

[26] *County of Sacramento v. Lewis*, 523 U.S. 833, 847 n.8, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998).

[27] *Martinez, supra* note 23.

[28] *Tyler, supra* note 11; *In re Roach, supra* note 14.

[29] See, e.g., *Vega v. U.S.*, 493 F.3d 310 (3d Cir. 2007); *Thompson v. Cockrell*, 263 F.3d 423 (5th Cir. 2001); *Hawkins v. Freeman*, 195 F.3d 732 (4th Cir. 1999); *Dunne, supra* note 17.

[30] *Tyler, supra* note 11, 273 Neb. at 108, 728 N.W.2d at 556. Accord, *In re Roach, supra* note 14; *Schwichtenberg, supra* note 19.

[31] *In re Roach, supra* note 14; *Schwichtenberg, supra* note 19.

For decades, the common-law rule in Nebraska was harsh but simple: Prisoners were not entitled to credit for time spent outside the prison, regardless of the circumstances.[32] The first sign that this longstanding rule might be in jeopardy came in *Texel*.[33] In dicta, the *Texel* court observed that prisoners have the right to serve their sentences in a continuous manner,[34] a conclusion which, as noted above, is universally cited as a reason to provide a remedy in interrupted-sentence cases.[35]

More recently, we had occasion to discuss credit for time spent at liberty in *Tyler v. Houston*.[36] In *Tyler*, a prisoner sought day-for-day credit for time spent out on bond while the state appealed, and ultimately succeeded in overturning, the district court's grant of habeas relief. Although we surveyed court decisions applying the equitable doctrine, we found it unnecessary to formally adopt or reject the doctrine in that case. As we explained, even jurisdictions recognizing the equitable doctrine refused to grant credit for time spent at liberty while the government appeals an adverse habeas ruling.[37]

Resolving Anderson's claim requires that we finally confront questions hinted at in *Texel* and left unresolved in *Tyler*: Are prisoners in Nebraska ever entitled to day-for-day credit for time erroneously spent at liberty under the equitable doctrine, and if so, under what circumstances will such credit be forthcoming? It is to those questions that we now turn.

(b) Variations of the Equitable Doctrine

In considering whether to adopt the equitable doctrine in Nebraska, we note that there are numerous variations to choose from. The Ninth Circuit, for example, simply grants credit for time erroneously spent at liberty so long as the prisoner did

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[32] See, *Ulrich v. O'Grady*, 136 Neb. 684, 287 N.W. 81 (1939); *Goodman v. O'Grady*, 135 Neb. 612, 283 N.W. 213 (1939); *Mercer v. Fenton*, 120 Neb. 191, 231 N.W. 807 (1930).

[33] *Texel, supra* note 2.

[34] *Id.*

[35] See, e.g., *White, supra* note 15.

[36] *Tyler, supra* note 11.

[37] *Id.* (citing *Hunter v. McDonald*, 159 F.2d 861 (10th Cir. 1947)).

not contribute to his or her release.[38] In so holding, the Ninth Circuit does not take into account whether the prisoner misbehaves while at liberty.[39] Several other courts, however, find that prisoners who "abscond[] legal obligations while at liberty" are not entitled to credit for time spent at liberty under the equitable doctrine.[40]

Similarly, courts recognizing the equitable doctrine disagree about whether to grant credit to prisoners who remained silent when released, even though they knew the release was premature. A few courts, including the Ninth Circuit and Arizona Supreme Court, conclude that such "informed silence" is inconsequential. Those courts grant credit for time spent at liberty even where the prisoner knew the release was erroneous and yet said nothing to authorities.[41] In contrast, several other courts have either denied credit in cases of informed silence[42] or, conversely, granted credit specifically because the prisoner informed officials of the mistake.[43]

The district court in this case specifically found that Anderson did not cause his premature release, nor is there evidence that Anderson committed any crimes while he was erroneously at liberty. However, a legitimate question remains as to whether Anderson knew that his release was premature and yet remained silent.

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[38] *Martinez, supra* note 23.

[39] See *Schwichtenberg, supra* note 19 (citing *Martinez, supra* note 23).

[40] *Tyler, supra* note 11, 273 Neb. at 109, 728 N.W.2d at 557. See, e.g., *In re Roach, supra* note 14; *Brown v. Brittain*, 773 P.2d 570 (Colo. 1989); *In re Messerschmidt*, 104 Cal. App. 3d 514, 163 Cal. Rptr. 580 (1980).

[41] See, *Martinez, supra* note 23; *Schwichtenberg, supra* note 19. See, also, *Vega, supra* note 29; *People ex rel. Bilotti v. Warden*, 42 A.D.2d 115, 345 N.Y.S.2d 584 (1973).

[42] *Diaz v. Holder*, 136 Fed. Appx. 230 (11th Cir. 2005); *Gaines v. Florida Parole Com'n*, 962 So. 2d 1040 (Fla. App. 2007); *Pugh v. State*, 563 So. 2d 601 (Miss. 1990). See, also, *In re Roach, supra* note 14 (Chambers, J., concurring).

[43] *White, supra* note 15; *United States v. Merritt*, 478 F. Supp. 804 (D.D.C. 1979); *Hartley v. State*, 50 Ala. App. 414, 279 So. 2d 585 (1973) (quoting *White, supra* note 15).

In *Schwichtenberg v. ADOC*,[44] the Arizona Supreme Court addressed whether prisoners who remain in informed silence are entitled to credit under the equitable doctrine. The court framed the issue as whether a prisoner was "at fault" for his premature release simply because he knew the release was erroneous yet said nothing. The court observed that "fault" implies that an individual "refrained from doing that which he had a duty to do."[45] Because a prisoner is "under no legal obligation" to speak up, the court concluded that a prisoner's informed silence should not disqualify him or her for sentence credit under the equitable doctrine.[46]

[10] We believe, however, that credit for time spent at liberty should be unavailable to prisoners who are aware of the error, yet fail to object. A refusal to grant credit for time spent at liberty is not a form of punishment, and therefore, it is irrelevant that prisoners have no legal duty to bring a mistake to the attention of authorities. Rather, "[c]redit for time erroneously at liberty is an equitable doctrine and should be applied only where equity demands its application."[47] Therefore, the conclusion that informed silence disqualifies a prisoner from receiving sentence credit reflects not so much that the prisoner failed to execute a legal duty, but that such behavior renders the prisoner ineligible for equitable relief.

That certain behavior might prevent a prisoner from invoking the equitable doctrine is not a novel concept. Indeed, as noted above, numerous courts believe that it would offend notions of equity to credit a prisoner for time erroneously spent at liberty if the individual spent that time committing additional crimes. We believe similar considerations ought to apply as to how a prisoner handles the prospect of being released prematurely.

It has been said, both here and elsewhere, that two rights are served by the equitable doctrine. The first right is society's "right to expect that once a defendant has been incarcerated, the

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[44] *Schwichtenberg, supra* note 19.

[45] *Id.* at 579, 951 P.2d at 454.

[46] *Id.*

[47] *In re Roach, supra* note 14, 150 Wash. 2d at 38, 74 P.3d at 139 (Chambers, J., concurring).

time will not be served in bits and pieces."[48] Of course, it is also true that "[t]hose tried and convicted of crimes owe a debt to society" and that "[s]ociety is entitled to have that debt paid."[49] So whatever society's interest in seeing that the government does not play cat and mouse with prisoners, society has at least as much "interest in knowing that its criminals are serving the punishment to which they have been sentenced, regardless of . . . negligent error attributable to the government."[50]

That leaves us with the other interest served by the equitable doctrine: The right of "a prisoner . . . to pay his debt to society in one stretch, not in bits and pieces."[51] Drawing upon this language, Anderson reminds us that he "had the right to serve his sentence in one single period of incarceration under Nebraska law."[52] Of course, a prisoner who genuinely cherishes his right to a continuous sentence, as Anderson purports to be, should at least "call[] attention to the mistake being made" before being "ejected from the penitentiary."[53]

In contrast, a prisoner who remains in informed silence when erroneously released and then asks for equitable relief upon reincarceration is not truly motivated by the right to a continuous sentence. Rather, such a prisoner is motivated by nothing more than the unsurprising desire to avoid as much jail time as possible. It takes little imagination to see that prisoners who know their release is premature might nevertheless remain silent in the hope that the mistake will go unnoticed by officials. Predictably, when officials discover the mistake, these prisoners try to obtain credit for time spent at large by arguing that the mistaken release—a mistake they declined to point out—deprived them of the right to a continuous sentence. It seems plain to us, however, that the equitable doctrine

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[48] *Texel, supra* note 2, 230 Neb. at 814, 433 N.W.2d at 544.

[49] *In re Roach, supra* note 14, 150 Wash. 2d at 38, 74 P.3d at 139 (Chambers, J. concurring).

[50] *Com. v. Blair*, 699 A.2d 738, 743 (Pa. Super. 1997). See, also, *Artez v. Mulcrone,* 673 F.2d 1169 (10th Cir. 1982).

[51] *Texel, supra* note 2, 230 Neb. at 814, 433 N.W.2d at 544.

[52] Brief for appellee at 9.

[53] See *White, supra* note 15, 42 F.2d at 789.

was not meant to encourage such a blatant attempt to game the system.

[11-13] Like a majority of courts, we agree that no equitable relief is required where a prisoner causes his or her own premature release from prison, thwarts governmental attempts at recapture, or misbehaves while at liberty. But we also believe that "[w]here it is clear that a prisoner had knowledge of a government mistake and made no effort to correct it, equity does not demand credit for time at liberty."[54] As such, we hold that prisoners who had knowledge of a governmental mistake and yet made no effort to correct it—like prisoners who actively cause or prolong a premature release or commit crimes while at liberty—do not deserve sentence credit under the equitable doctrine. Such a prisoner has essentially acquiesced in the loss of his or her right to a continuous sentence.

[14,15] To preserve the right to credit for time spent at liberty, a prisoner who knows his or her release is erroneous must make a reasonable attempt to notify authorities of the mistake. Although the prisoner need not "continue to badger the authorities," a reasonable attempt may well include voicing an objection at the time of release or contacting authorities a short time later in order to clarify his or her status.[55]

Having determined that informed silence disqualifies a prisoner from receiving credit for time spent at liberty, we next address how lower courts should determine whether the prisoner knew that the release was, in fact, premature. It has been argued elsewhere that determining whether a prisoner knew the release was premature would be "difficult or impossible."[56] The argument is that the complex nature of modern sentencing schemes would make it difficult for prisoners to identify a precise release date and therefore recognize that they are being released prematurely.[57]

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[54] See *In re Roach, supra* note 14, 150 Wash. 2d at 39-40, 74 P.3d at 139 (Chambers, J., concurring).

[55] *Merritt, supra* note 43, 478 F. Supp. at 807.

[56] *Schwichtenberg, supra* note 19, 190 Ariz. at 579, 951 P.2d at 454.

[57] See *id.* See, also, *In re Roach, supra* note 14 (Chambers, J., concurring).

[16] In responding to these concerns, we note that "[a]mong our most cherished rights, as American citizens, are the freedom of choice as to our movements, to be free to go where and when we wish, and the right to control and use our worldly possessions as we see fit."[58] Given the significance of those interests, we believe that unless the sentence has been extensively modified by things such as earned release time, work release, or a commutation, a prisoner ought to know the date of his or her release with some precision. We therefore hold that the prisoner carries the burden to show that the complexity in calculating his or her release date, or some cognitive deficiency, prevented him or her from realizing the release was premature. At the same time, the government has what essentially amounts to a burden of production to provide the prisoner with any and all records relevant to this inquiry. Such records would include any copies of the original sentencing order, as well as any records related to earned release time, work release, commutations, and any other such materials.

The record in this case does not conclusively resolve whether Anderson tried to inform officials that his release was premature. We therefore find it necessary to remand this cause for the trial court to determine whether Anderson tried to inform officials of their mistake and, if not, whether Anderson reasonably did not know his sentence was set to expire.

On remand, the district court is directed to make findings regarding the circumstances surrounding the 14-month lag from the date the district court authorized Anderson's recapture and the date the warrant was actually issued. Specifically, the district court is to determine whether Anderson had or should have had notice of the September 24, 2003, hearing on the Department's motion for capias. The parties should also present evidence with regard to Douglas County's motion to declare a forfeiture of Anderson's bond. If notice of either hearing was mailed to Anderson's residence, it could be evidence that Anderson knew his release was premature from that point forward. We reemphasize that the Department has a duty to provide any records and documents that may be relevant to this inquiry.

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[58] *Boockholdt v. Brown*, 224 Ga. 737, 739, 164 S.E.2d 836, 838 (1968).

On remand, the parties should also present evidence as to why the arrest warrant for Anderson was not issued immediately after it was authorized by the district judge on September 24, 2003. Since the Department has a responsibility to provide any records relevant to this issue, the district court's inquiry in this regard should include a determination as to whether the delay was the part of an organized and diligent plan to notify, find, and reapprehend Anderson, or was instead the product of misconduct—negligent or affirmative—by public officials. If the latter, the district court shall determine what impact, if any, this should have on the equities of denying Anderson credit for any or all of the 14 months after the warrant was authorized, but before it was issued. Obviously, this equitable analysis should be conducted in a manner consistent with the rationale and policies expressed in this opinion.

3. Propriety of Orders Following Department's Notice of Appeal

The only issue remaining for our resolution is whether the district court exceeded its authority when it issued orders granting Anderson's request for payment of court costs and granting Anderson's motion to withdraw a prior request for legal fees. To refresh, these orders, filed on January 20 and February 10, 2006, respectively, were issued *after* the Department had already filed notice of its intent to appeal the district court's decision to grant Anderson habeas relief.

[17] It is well settled that a trial court is divested of jurisdiction when a party perfects appeal of a final order.[59] The question here is whether an order granting habeas relief to the petitioner qualifies as a final order. Anderson argues that the order granting the writ of habeas corpus was not a final order because there were still matters left for the court to resolve. The Department argues the district court's order granting Anderson habeas relief was the final, appealable order. We agree.

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[59] See, *Billups v. Scott*, 253 Neb. 293, 571 N.W.2d 607 (1997); *McLaughlin v. Hellbusch*, 251 Neb. 389, 557 N.W.2d 657 (1997); *WBE Co. v. Papio-Missouri River Nat. Resources Dist.*, 247 Neb. 522, 529 N.W.2d 21 (1995).

[18-20] Long ago, this court held that "[t]he test of finality for the purpose of an appeal in a habeas corpus proceeding is not necessarily whether the whole matter involved in the action is concluded, but whether the particular proceeding or action is terminated by the judgment."[60] We have previously held that an order denying habeas corpus relief qualifies as a final order.[61] Therefore we hold that an order granting habeas relief also qualifies as a final order. As such, the district court was divested of jurisdiction when the Department perfected its appeal of the district court's order granting Anderson's petition for habeas relief. We therefore vacate the orders filed January 20 and February 10, 2006, for lack of jurisdiction.

VI. CONCLUSION

We conclude that the Douglas County District Court had jurisdiction over Anderson's habeas petition. Anderson was confined in Douglas County at the time of the initial hearing in this case, and the Department waived jurisdiction at the initial hearing.

We further conclude that the district court erred in granting Anderson's habeas claim. The equitable doctrine of sentence credit for time spent at liberty should not apply in cases where the prisoner (1) caused or prolonged the premature release, (2) committed crimes while at liberty, or (3) knew the release was premature yet failed to bring the mistake to the government's attention. Because we cannot determine, based on this record, whether Anderson attempted to inform authorities of their mistake, we find it necessary to remand the cause to the district court. On remand, the court is to determine whether Anderson made a reasonable attempt to inform authorities of their mistake and, if not, whether Anderson legitimately did not know his release was premature. As expressed above, the court is also directed to make factual findings and conclusions regarding the circumstances surrounding the 14-month period between the

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[60] *In re Application of Tail, Tail v. Olson*, 144 Neb. 820, 825, 14 N.W.2d 840, 843 (1944).

[61] *Olson, supra* note 60.

time the district court authorized an arrest warrant for Anderson and when it was issued.

Finally, we hold that the district court lacked jurisdiction when it issued two orders after the Department perfected its appeal of the court's decision to grant Anderson's petition. Accordingly, those orders are hereby vacated.

JUDGMENT IN NO. S-05-1561 REVERSED, AND CAUSE REMANDED FOR FURTHER PROCEEDINGS.
JUDGMENT IN NO. S-06-206 VACATED.

CONNOLLY and GERRARD, JJ., concur in the result.

WRIGHT, J., concurring.

I concur. The issue is whether Anderson is entitled to credit for time spent at liberty as a result of being prematurely released. This is an equitable doctrine.

If the prisoner is obligated to notify the proper authority when he knows his release was premature, the State has an obligation to act when it discovers the error. The State is permitted one error, but not two.

The Department discovered its mistake and sought a warrant in Douglas County District Court. The court signed the warrant, but the clerk's office did not issue the warrant for approximately 14 months.

When considering what is fair, the State cannot be twice negligent at the prisoner's expense. Once the State discovered the premature release, it had a duty to act promptly.

If the State cannot establish a valid reason why the warrant was not issued immediately after it was signed by the court, Anderson should be entitled to credit for the time the State knowingly failed to act. There is no evidence that Anderson caused his premature release, nor is there evidence that he committed any crimes while he was at liberty. Equity must shine on both sides of the coin.

IN RE DISSOLUTION AND WINDING UP OF KEYTRONICS, FORMERLY KNOWN AS SECURE DATA SYSTEMS, A NEBRASKA GENERAL PARTNERSHIP. SCOTT WILLSON, APPELLANT, V. DON KING, APPELLEE.

744 N.W.2d 425

Filed February 1, 2008. No. S-06-690.

1. **Partnerships: Appeal and Error.** In considering the proper standard of review for the question of the existence of a partnership, an appellate court applies the standard of review generally applicable to the underlying action.
2. **Partnerships: Equity: Appeal and Error.** An action for the dissolution of a partnership and an accounting between partners is one in equity and is reviewed in the appellate court de novo on the record.
3. **Partnerships: Intent.** A business qualifies under the "business for profit" element of Neb. Rev. Stat. § 67-410(1) (Reissue 2003) so long as the parties intended to carry on a business with the expectation of profits.
4. **Partnerships: Proof.** The burden of establishing the partnership is upon the party asserting that such a relationship exists.
5. ____: ____. In an action inter sese between alleged partners, the party asserting the existence of a partnership must prove that relationship by a preponderance of the evidence.
6. **Partnerships: Intent.** If the parties' voluntary actions form a relationship in which they carry on as co-owners of a business for profit, then they may inadvertently create a partnership despite their expressed subjective intention not to do so.
7. ____: ____. Being "co-owners" of a business for profit does not refer to the co-ownership of property, but to the co-ownership of the business intended to garner profits.
8. **Partnerships: Words and Phrases.** Co-ownership distinguishes partnerships from other commercial relationships such as creditor and debtor, employer and employee, franchisor and franchisee, and landlord and tenant.
9. **Partnerships.** Co-ownership generally addresses whether the parties share the benefits, risks, and management of the enterprise such that (1) they subjectively view themselves as members of the business rather than as outsiders contracting with it and (2) they are in a better position than others dealing with the firm to monitor and obtain information about the business.
10. **Partnerships: Proof.** The objective indicia of co-ownership are commonly considered to be: (1) profit sharing, (2) control sharing, (3) loss sharing, (4) contribution, and (5) co-ownership of property. The five indicia of co-ownership are only that; they are not all necessary to establish a partnership relationship, and no single indicium of co-ownership is either necessary or sufficient to prove co-ownership.

Appeal from the District Court for Buffalo County: JOHN P. ICENOGLE, Judge. Reversed and remanded for further proceedings.

Mitchel L. Greenwall, of Yeagley, Swanson & Murray, L.L.C., for appellant.

Bradley D. Holbrook, of Jacobsen, Orr, Nelson, Wright & Lindstrom, P.C., for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MCCORMACK, J.

NATURE OF CASE

The issue in this case is whether a business partnership was formed between Don King and Scott Willson and, if so, what business activities were part of that partnership. The Uniform Partnership Act of 1998 (the Act),[1] at § 67-410(1), states that "the association of two or more persons to carry on as co-owners a business for profit forms a partnership, whether or not the persons intend to form a partnership." Willson brought an action for the winding up and an accounting, alleging formation of a partnership, and King counterclaimed for wrongfully withholding property, denying the partnership. The district court found that King and Willson had "pooled resources, money and labor," but found no partnership existed because there was no "specific agreement." Alternatively, the court found that because King did not commit his preexisting business to any specifically formed partnership, the scope of the partnership did not encompass any activity-garnering profits. Willson appealed the district court's order. We reverse, and remand for further proceedings.

BACKGROUND

King and Willson first met sometime in 1999 when Willson, an electronics technician and computer programmer, was working at a computer store. King was doing business at that time under the name of "Washco," as a sole proprietorship, and King contracted with the store for a computer repair. Washco sold and installed carwash systems and accessories. It also serviced

[1] Neb. Rev. Stat. §§ 67-401 to 67-467 (Reissue 2003).

existing carwash systems and the systems it sold. Washco later became Wash Systems, Incorporated.

One of the products King offered to his customers was the "QuikPay" system. QuikPay is a cashless vending system for carwashes. Customers use a memory chip key that can be placed on their key chain and used with a controller at the carwash. Either a cash value can be placed on the key, or an account can be established through which carwash usage recorded on the key is billed monthly.

Washco purchased QuikPay systems for resale from Datakey Electronics Inc. (Datakey). Datakey's main line of business was the manufacture and sale of keys with reprogrammable memory and their corresponding "Keyceptacles" for a variety of applications. The QuikPay carwash system was only one such application, and it was becoming unprofitable for Datakey.

Part of the reason that the QuikPay system was unprofitable was that the keys for QuikPay could only be obtained from an attendant. If the key was set up for cash, when the credit ran out, the key could only be recharged through an attendant. Glen Jennings, president of Datakey, explained that since most carwashes are unattended, this reliance on the presence of the carwash owner or employee was limiting the product's market. The system needed some "peripherals" to make it self-service. Datakey had decided, however, not to dedicate its limited engineering resources to the design or manufacture of such "peripherals." It was looking into the possibility of working with an outside source as the original equipment manufacturer of such items.

As QuikPay's largest distributor, King was aware that QuikPay's limitations made the product unattractive to many of his customers. King was also having other problems with the system. In the spring of 2002, Willson was working at a new company as a computer programmer. King contacted Willson privately to see if Willson could develop a combined "key dispenser" and "revalue station" for the QuikPay system that would make the system self-service. King also asked Willson if he would design and install an interface between the QuikPay system and the carwash of one of King's customers. King explained that although most carwashes already contained a

third-party interface that would easily connect with the QuikPay system, a few did not. Without such an interface, King was unable to sell QuikPay to these customers. Designing such an interface was beyond King's technical expertise.

There is little evidence in the record as to what sort of business arrangement was made with regard to Willson's services in designing the interface. King states only that compensation "was never discussed," and, in fact, Willson was never paid for his work. It is undisputed that Willson individually designed and installed at least four specific customer interfaces that allowed King to sell the QuikPay system to those customers.

As to the development of the key dispenser-revalue station, King testified there was an oral agreement among himself, Willson, and Scott Gardeen. Gardeen was an employee of Datakey who was an original designer of QuikPay and was King's main contact with Datakey. According to King, they agreed they would form a corporation whenever Willson developed the key dispenser-revalue station. Gardeen also recalled discussing their business as a future corporation because they were concerned about personal liability issues inherent to partnerships. Willson, on the other hand, had no memory of specifically discussing the formalities of their business relationship. He was sure that they had agreed they would all "be a part of it" and that they "each had a piece of the pie."

The three parties met in Des Moines, Iowa, in the spring of 2002 to discuss the venture in which they would design and build the key dispenser-revalue station and sell it to Datakey. It was agreed that Willson would write the software and do the firmware, hardware, and any other electrical or software work; Gardeen would contribute his knowledge of the system and his contact with Datakey; and King would contribute financial resources and his experience and contacts as QuikPay's largest distributor.

Together, Willson, King, and Gardeen came up with the name "Secure Data Systems" for their business. They discussed the fact that the entity's initials, "SDS," were also the initials of their first names, Scott, Don, and Scott. By the summer, Willson had built a hand-held revalue station for a meeting with Jennings. Jennings indicated that if a

final, marketable key dispenser-revalue station were developed, Datakey would be interested in a business relationship with Secure Data Systems.

In the meantime, King was becoming increasingly frustrated with maintenance of the QuikPay system for his customers. In September 2002, King sent a letter to Gardeen complaining about various issues with the system. The main complaint was that controllers were not operating properly. Although Datakey provided King with replacement controllers, King had to drive long distances to his customers' sites to manually implement the replacement or make other repairs he had not anticipated. In the letter, King stated:

> I can not [sic] continue to expose my self [sic] to the expense of keeping this stuff running. Besides the expense I don't have the time. I don't see that I have any other choice but to back away from selling additional clients. At least until the current problems are stable or we have a new controller. I don't feel like I can honestly charge or pass expense's [sic] on to my customer when this product continues [to] have problems.

King then proposed:

> Because of [Willson's] future interests, I believe he would be more motivated to address issues with the current controller than a programmer with no interest in the system. [Willson] has mentioned that programming cost can exceed one hundred dollars an hour. If . . . Willson were to work on the current system I believe he should be compensated for his work. I would have to discuss it with . . . Willson, but I don't believe he would demand those kind[s] of fees.

King suggested that Datakey allow Willson access to its proprietary software.

King continued to involve Willson in dealing with other technical issues relating to King's QuikPay customers. Willson explained: "[T]here w[ere] a lot of problems with the QuikPay units. Sometimes they would put the wrong version of firmware on there or they wouldn't program for them at all and the units just wouldn't function properly." It became King's regular practice to copy Willson into his e-mail correspondence with

Datakey concerning QuikPay system maintenance. According to Willson, King and Willson communicated regularly about both the development of the key dispenser-revalue station and QuikPay maintenance. Willson testified that he did not demand or receive payment for these services, but believed they were part of his contribution to the partnership.

Around October 2002, Datakey decided to discontinue its QuikPay line. Its minimal sales of QuikPay were outweighed by Datakey's costs in addressing support issues for the product. To each of its customers, Datakey sent one controller for every two they had ever purchased, and informed them that Datakey would no longer be supporting their product.

Datakey referred all of its customers to King at Washco for continued support of the system. Datakey's customer base consisted of approximately 20 or 30 customers with a total of at least 200 QuikPay controllers in use. It is unclear how many QuikPay customers King had had prior to this time. Datakey also gave to King, without charge, all of the parts and equipment relating to QuikPay that Datakey had in stock. This inventory had an original procurement cost of approximately $200,000. Datakey had already given King and Willson access to its software source codes. Jennings explained, "[W]e were happy to have somebody who would give [QuikPay customers] best-efforts supports [sic], because obsoleting a product can reflect poorly on our name." In addition, Datakey hoped to be able to continue selling its keys and Keyceptacles to QuikPay customers, if those systems were kept "alive" by King.

Willson testified that from the moment King acquired Datakey's customers and inventory, Willson was very involved in making this acquisition a success. Willson testified that King immediately asked him to put together a list of things that they needed from Datakey to make all the inventory work. The record contains an e-mail from Willson to King with this list. In the e-mail, Willson also offered to accompany King to Minneapolis, Minnesota, to Datakey's headquarters if necessary and Willson stressed that they would need as much information as possible from Datakey "in order to make this a successful venture."

Willson explained that he was in charge of assembly and repairs of the QuikPay inventory once they received it. The inventory was shipped in pieces, and many of the old input/output, or I/O, boards had to be updated with the newest version of the QuikPay program so that the QuikPay units would function properly. Willson stated that his direct and indirect involvement in customer service for the QuikPay line also increased at this time.

Willson stated he was in frequent communication with King regarding the QuikPay acquisition from Datakey and the development of their new customer base. Willson said he discussed with King in detail what would be appropriate pricing for QuikPay repairs and equipment. The record contains evidence of an e-mail from King to Willson with the QuikPay pricing schedule. According to Willson, he and King discussed ways to minimize costs of the QuikPay units. For example, Willson stated that they jointly made the decision to discontinue about half of the QuikPay box styles previously available to customers so that they could cut down on Secure Data Systems' costs. Willson also stated that they discussed creating a new brochure to promote the QuikPay line to customers. "[B]etween helping customers and modifying boards and getting the units put together and tested so that [King] could sell those," Willson stated that when he had time, he also continued to work on developing the key dispenser-revalue station.

King testified that by the beginning of 2003, he had deliberately separated his QuikPay sales, maintenance, and its future development from his Washco carwash business and had moved all QuikPay business to Secure Data Systems. Around the same time, Willson developed a Web site for Secure Data Systems with e-mail accounts for King and Willson.

King continued to operate Washco as he had previously, selling and maintaining the non-QuikPay carwash systems and accessories. There is no allegation that Willson was ever involved in non-QuikPay Washco ventures.

King and Willson had difficulties with some of the inventory acquired from Datakey. The record contains a draft letter that King e-mailed to Willson, in which King expressed his frustration to Gardeen, who, as mentioned, was King's main liaison

with Datakey. Apparently in reference to himself and Willson, King repeatedly referred in the letter to "we" and "us." King stated that he would rather be writing a letter to Jennings thanking him for "the faith that he extended to us that we have the ability to make the QuikPay system work." But, the system had been "pieced mealed [sic]" to "us" and remained incomplete. King made several complaints and described some of the future challenges his acquisition would present:

> Regarding the [computer] software, because of licensing agreements, you told us that we had [to] go out and buy [a specific computer application]. We did and as you know it did not work. Now you are telling us that we are going to have to go out and buy [another computer application]. . . .
>
> . . . .
>
> You suggested that we get on with development of a new controller and write all new software. When the parts run out, end users will simply have to purchase new controllers and software. Development of a new controller and software will differently happen. . . .
>
> With the exception of the data back up problem in the [computer] software, the controller and firmware with the latest updates appear to be stable. On the other hand we have no idea what is going to surface down the road.

King reminded Gardeen that there were customers with substantial commitment to Datakey's key and that they "deserve better." King asked Datakey for more assistance and reiterated that "we are looking forward to a long and successful association with Datakey."

Jennings explained that when King took over the QuikPay system, Datakey had sent King compact discs with the source files and other information Datakey thought would be needed to support the system, but King was still having trouble getting things to run. Both Jennings and Gardeen testified that it was apparent that Willson was the person working with King to get the QuikPay equipment working. And there was substantial correspondence between Datakey and Willson regarding the QuikPay system. Eventually, Jennings sent an e-mail to Willson, copied to King, explaining that rather than trying to

figure out which file might still be missing from the compact discs sent to them, Datakey would simply rebuild the system on a computer and lend that computer to Willson as a reference tool. This was, in fact, done.

When Jennings was asked whether he knew who the owners of Secure Data Systems were, he answered that he "understood that . . . King and . . . Willson were involved in Secure Data Systems." Upon further questioning, Jennings testified, however, that it was "never clarified" whether both King and Willson owned Secure Data Systems or whether one worked for the other.

In May 2003, King and Willson went together to an international carwash convention in Las Vegas, Nevada. King suggested to Willson that he make up Secure Data Systems business cards for King and Willson. The cards presented Willson as "System Designer & Engineer" and King as "Sales." The cards described Secure Data Systems as carrying the "QuikPay Product Line." According to King, "you just simply don't go to a convention like that without a card telling people who you are." In an e-mail sent by Willson to King at the end of April, Willson asked King not to print up too many cards yet because the next month he was planning on having a second telephone line installed "specifically for Secure Data Systems so customers will have limited access to me as well," and he wished to add that number to his card.

After the Las Vegas trip, King and Willson had an argument about the Secure Data Systems Web site because Willson had made reference to a trademark name and logo on the site and King was concerned about legal liability. Willson stated that he became upset because of the way he felt he was being treated by King during the argument. After the argument, Willson sent an e-mail to King stating, "[R]egarding Secure Data Systems and our partnership, I have decided to take your suggestion and leave you in complete control and give you complete ownership." Both King and Willson testified, however, that they soon reconciled after this disagreement. They then continued with their relationship as before, apparently without King's ever objecting to Willson's characterization of their business relationship as a partnership, and himself as a co-owner.

By the spring of 2003, Willson explained that his work for Secure Data Systems consisted primarily of dealing with QuikPay maintenance and repair issues, although he continued to try to finish the key dispenser-revalue station whenever he had time. Willson made changes in the QuikPay software to fix some "annoy answers" and other problems that customers wanted fixed. Willson then placed the software "patch" on the Secure Data Systems' Web site for downloading by Secure Data Systems' customers. There were also firmware upgrades that had been designed by Datakey that had to be implemented. On one occasion, Willson had to recover data and repair a unit that had been struck by lightning.

Another maintenance job that Willson did was to continue to modify I/O boards. Willson explained that the "older style [of I/O boards] were burning out due to a transistor, a component of the board not being set up right." This particular modification had been designed by Datakey, and Willson only implemented it. By September, Secure Data Systems had hired another company to do the I/O board modifications because, as Willson explained, the boards took about 45 minutes each and there came to be too many of them.

Willson testified that King would call him regularly with any number of QuikPay maintenance problems. According to Willson, King was usually the direct contact with QuikPay customers. Willson would correct the issues during the evening and early morning hours and put the repair information onto the Secure Data Systems' Web site for King to look at the next morning. Willson stated that he also worked directly with QuikPay customers on occasion.

As early as June 2003, Willson had asked King to clarify what King thought Willson's priorities should be concerning his contribution to Secure Data Systems. King had asked Willson to deal with a customer complaint as to the failure of QuikPay's managing software to automatically record cash keys for accounting. In an e-mail to King, Willson explained that he would rewrite a portion of the software, but that these QuikPay maintenance issues were taking time away from developing the key dispenser-revalue station:

> We need to get the vending machine completed, but I get mixed signals from you alot [sic] as to what you want to do. (ie. [sic] Vending machine, expresskey patch and now this). I realize that they are all important and need to be add[re]ssed and taken care of, but we need to stop moving back and forth, finish one and move on to the next as we talked about before. Drop me a line and let me know what you think we need to be focusing on.

King replied:

> I don't intend to send mixed messages. I feel our priorities ha[ve] always been and should remain on the Revalue Station. We should follow up with a new controller, software and hand held read/writer. . . .
>
> This issue with this customer in Columbus[, Nebraska,] is not the first time we have heard this complaint. It is however the first time we have had a customer complain this strongly about it. Issues like this and the complaints that brought about the software patch, etc., arise routinely in the course of the day to day activities of doing business. We can not [sic] ignore these issues. We have to deal with them in a manner that allows us to stay focused and still do the best we can to deal with the complaints. It may mean that we can only address a giv[en] issue with a band aid [sic] or on a temporary basis. If it [is] something that we can not [sic] provide we then have no other choice but to advise the customer as such. If it is something that is going to take a lot of time then we need to value the importance while keeping our priorities in mind.
>
> I am going to continue to call you when these things come up. Again it is not by intention to change priorities. We need to discuss these issue[s], if we can do anything, the importance and how we want to handle what ever [sic] comes along.

The record contains 17 repair tickets dating from March to November 2003, totaling $4,150.77 in repairs done by Willson on QuikPay systems for various customers. King admits that either directly or indirectly, customers were billed off of these tickets that King obtained through the Secure Data Systems' Web site. Another bill is found in the record sent by King to

a client for $600.26 in controller repairs, which King told the client had been done by "Scott." At trial, Willson estimated that he had put at least 2,000 hours into QuikPay sales and maintenance and in developing the key dispenser-revalue station.

In correspondence with clients, King often referred to Willson as the person doing technical work for QuikPay. Willson also sent e-mails communicating directly with QuikPay clients on various issues. In an e-mail dated August 12, 2003, Willson describes himself as the software and hardware designer with Secure Data Systems and he refers to King as his "partner." The record contains correspondence between King and Willson discussing Secure Data Systems' purchases for QuikPay maintenance and development. In an e-mail from November 2003, King forwarded to Willson the price list for what he had been quoting customers for QuikPay repairs.

In October 2003, King sent an e-mail to a potential customer in which King referred to Willson as "the other half of Secure Data Systems." This potential customer had an old version of QuikPay, and King was trying to sell the owner updates that Willson, who "does all the programming," had made to the software and firmware. These updates, King explained, coupled with the necessary hardware updates, would resolve the owner's current complaints with his QuikPay system. King referred the customer to the Secure Data Systems' Web site for Willson's instructions as to how the owner should send his database in for updating.

Willson incurred out-of-pocket expenses in 2002, but those were apparently reimbursed by King. Willson stated that because these out-of-pocket expenses were relatively small, King had instructed him to make a list of those expenses so that King could claim them on his taxes and Willson would not have to worry about filing a special form. Willson was not aware that he was supposed to file a partnership tax form, and he never did so.

Again, in the first half of 2003, Willson testified that he incurred out-of-pocket expenses, and he stated that he did not always seek reimbursement for those expenses from King. It is undisputed that later that year, King gave Willson a credit card number and verification code so he could charge Secure Data

Systems' business to the card. It is unclear whether Willson believed the card was an official Secure Data Systems' card. It was, in fact, King's personal credit card that he had designated for Secure Data Systems' business. Willson used the card to purchase parts that he needed in working on QuikPay maintenance and in development of the key dispenser-revalue station. There is no evidence that Willson was required to get King's prior approval before incurring Secure Data Systems' related expenses.

When Willson was asked why he invested his time and expertise into QuikPay without any remuneration, he explained, "That was my contribution to the company. I mean that was my piece." Willson claimed that King periodically kept Willson informed about how much money was in the bank that had accrued in profits derived from QuikPay sales and maintenance. Willson alleged that sometime in 2003, he and King discussed distributing some of the profits through draws or bonuses at the end of the year.

Still, Willson "started getting uneasy." Willson explained that he "wasn't feeling comfortable continuing to repair controllers [and] create a vending machine when the only reassurance I had was, don't worry, I'm not going to leave you hanging." Willson contacted a law firm to draw up papers to formalize the partnership. These papers were never drafted. According to Willson, when he told King he was looking into creating a written agreement for their relationship, King "assured [him] that he was having his attorneys look at it," and King asked for his and his wife's Social Security numbers. Willson's wife testified at trial that she remembered when King asked for their Social Security numbers.

At the same time that Willson was seeking more formal guarantees of his partnership interest, King was expressing his impatience with the fact that Willson had not yet produced a key dispenser-revalue station. Willson's wife explained that shortly before the meeting, King had come over to their house to pick up something that Willson had worked on for QuikPay over the lunch hour and that King had complained about Willson's "dedication." She explained:

> I was very upset because at that time I wanted [Willson] to take our son to preschool and he couldn't go because he had to finish whatever it was [King] had him working on, something with the QuikPay. And I asked [King] how could you question his — you know, he's doing all — everything you ask him to do. He does everything that needs to be done. I didn't know of any incomplete things. Every time he had a chance, he was talking to [King] or getting things done that needed to be done with QuikPay.
>
> He never told [King] no. He didn't ask for any money, and I didn't understand how [King] could question [Willson's] dedication.

King and Willson had a meeting with their wives to discuss their respective concerns. Apparently, their respective unease was at least temporarily resolved. Willson's wife described the meeting as follows:

> And they were mainly focused on where they were going, the revalue station was their key. That's what they wanted to do. And [King] kept staying [sic], well, we have to make our customers happy. We have to get the QuikPay working. If that doesn't work, then you know the revalue station is — you know, he said we had to make our customers happy. And so he was telling [Willson] this as we were sitting at [a restaurant], and I thought the meeting went well. We had talked again about officers or I don't know how the business works. I was just trusting that [Willson] would let me know.

On cross-examination, Willson's wife clarified that when King was discussing keeping customers happy, he was referring to the existing QuikPay system and not the key dispenser-revalue station Willson was trying to develop. Willson similarly testified that at the meeting, they discussed "officers or something like that. For a corporation, I don't really understand all how that works, but at that time I felt at ease."

During this general time period, King discovered that the name "Secure Data Systems" had already been taken for incorporation and this was discussed with Willson. The name "KeyTronics" was suggested by Willson's wife. In December 2003, Willson developed a new Web site for "KeyTronics." Willson then

moved over the "service tracker" program and other information from the previous Secure Data Systems' Web site to the new Web site for "KeyTronics."

The record contains an e-mail dated December 13, 2003, in which King tells Willson that he had to cancel the "Secure Data [credit] Card" in order to get the name on the card changed to "KeyTronics." Willson sent King a list of his understanding of what the current objectives were for "KeyTronics." This list included completing projects relating to the development of the key dispenser-revalue station as well as certain goals relating to sales, inventory, and repairs for the existing QuikPay system. Willson testified that he was still optimistic about getting a key vending machine finished but that his relationship with King was deteriorating. Willson testified that "[w]e were arguing more, and nothing was getting done as far as paperwork."

King and Willson had another meeting around the end of December and agreed to end their relationship and any joint QuikPay or key dispenser-revalue station activities. Approximately 2 weeks after this meeting, King called Willson and offered to compensate him for the time he had spent in maintaining or repairing QuikPay. Willson refused and brought this action instead.

The record indicates King currently conducts QuikPay business under "Key-Tronics, Inc.," which is registered in King's name alone. Its sole line of business is the QuikPay system. King pays two independent contractors to assist him in installation, troubleshooting, and repairs.

King generally denied at trial any partnership relationship with Willson. King minimized Willson's assistance with regular QuikPay business and pointed out that Willson was never able to produce a marketable key dispenser-revalue station. King conceded that Willson had repaired 40 individual QuikPay controllers. He also noted that Willson had looked into some "glitches" in QuikPay's software package and had worked on an "LCD design" to go with the QuikPay controller. King indicated that Willson had worked on some I/O boards. Still, King could not believe that Willson had invested 2,000 hours in QuikPay or the key dispenser-revalue station, explaining, "[Willson] played softball, went out and helped his dad two nights a week, took

Japanese lessons. I truly don't know where you would come up with those kind of hours, the activity that he was doing."

King denied any agreement to share profits and equally denied any agreement to compensate Willson as an employee or independent contractor. King presented no explanation as to why, without any promise of remuneration, Willson contributed to King's QuikPay profits. King simply stated that the QuikPay business was solely his. He was distributing and maintaining QuikPay before he met Willson, and he asserted that the acquisition of Datakey customers and inventory did not significantly alter his business.

King did not recall asking for either Willson's or Willson's wife's Social Security number. He did vaguely admit to, at some point, telling Willson or his wife that he had spoken with an attorney about incorporating. King generally denied consulting with Willson about pricing for QuikPay or otherwise sharing in control of the QuikPay business. King emphasized that any work Willson did, which, again, he considered minimal, was always at King's request.

In its order, the district court, as the trier of fact, concluded: "[T]he evidence indicates that Willson and King pooled resources, money and labor." But, "the parties never entered into any specific agreement which would establish a partnership." Even if a partnership had been established, however, the court concluded that there would be no profits from the joint venture because "nothing in the evidence reflects that [King] ever committed his existing business and its related assets to the development efforts for the key system."

ASSIGNMENTS OF ERROR

Willson assigns that the district court erred in (1) finding that there was no partnership under Nebraska law and (2) finding that no dissolution and accounting were necessary.

STANDARD OF REVIEW

[1,2] In considering the proper standard of review for the question of the existence of a partnership, we apply the standard

of review generally applicable to the underlying action.[2] An action for the dissolution of a partnership and an accounting between partners is one in equity. As such, in this case, the trial court's determination as to whether a partnership was established is reviewed de novo on the record.[3]

ANALYSIS

This case is governed by the Act which was adopted after the passage of the revised Uniform Partnership Act.[4] Section 67-410(1) of the Act defines that a partnership is formed by "the association of two or more persons to carry on as co-owners a business for profit" and explains that this is true "whether or not the persons intend to form a partnership."

[3] Obviously, the relationship between King and Willson is "of two or more persons." In addition, whether the business of QuikPay maintenance, or even the development of the never-produced key dispenser-revalue station, qualifies as a business "for profit" is not in issue. It is not essential that the business for which the association was formed ever actually be carried on, let alone that it earn a profit. Rather, a business qualifies under the "business for profit" element of § 67-410(1) so long as the parties intended to carry on a business with the expectation of profits.[5]

Still, Willson admits he is not pursuing an action for an accounting of a partnership that would be limited to the development of a key dispenser-revalue station. That product was

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[2] See, *Lewis v. Gallemore*, 173 Neb. 211, 113 N.W.2d 54 (1962). Cf. *South Sioux City Star v. Edwards*, 218 Neb. 487, 357 N.W.2d 178 (1984). See, also, *Pennfield Oil Co. v. Winstrom*, 272 Neb. 219, 720 N.W.2d 886 (2006); *Gast v. Peters*, 267 Neb. 18, 671 N.W.2d 758 (2003); *Bass v. Dalton*, 213 Neb. 360, 329 N.W.2d 115 (1983); *Byram v. Thompson*, 154 Neb. 756, 49 N.W.2d 628 (1951).

[3] See, e.g., *Lewis v. Gallemore, supra* note 2.

[4] Unif. Partnership Act (1997) § 101 et seq., 6 U.L.A. 58 et seq. (2001).

[5] See, *Thompson v. McCormick*, 149 Colo. 465, 370 P.2d 442 (1962). See, also, 1 Alan R. Bromberg & Larry E. Ribstein, Bromberg and Ribstein on Partnership § 2.06(c) (2007); J. William Callison & Maureen A. Sullivan, Partnership Law and Practice, General and Limited Partnerships, § 5:10 (2006).

never produced and did not independently garner any profits to account for. We are instead asked to determine whether King and Willson were partners in an enterprise that involved both the development of the key dispenser-revalue station and the sales and maintenance of the regular QuikPay line. If so, Wilson claims that King must account to Willson for any profits relating to all QuikPay business.

The elements disputed by the parties are whether there was an "association" formed for QuikPay business, and whether such association, if created, was as "co-owners." The existence of a partnership is a question of fact under the evidence.[6] Because this is an action for an accounting, which lies in equity, we conduct our review de novo on the record, reaching a conclusion independent of the findings of the trial court.

Burden of Proof

[4] The burden of establishing the partnership is upon the party asserting that such a relationship exists.[7] We have said that where the plaintiff is alleging a partnership with the defendant, which the defendant denies, the plaintiff must establish the existence of the partnership by clear and convincing evidence. In contrast, where a third party to the alleged partnership has brought the action, the third party need only prove the existence of a partnership by a preponderance of the evidence.[8] Thus, we have required more convincing evidence to prove the existence of a partnership where the alleged partners are the only litigants than where the controversy is between a third party and the partners.[9]

In *In re Estate of Wells*,[10] we were not presented with a controversy between a third party and the partners. Furthermore, the plaintiff in that case was one of the alleged partners. Yet, we held that the plaintiff's burden of proof to establish the partnership was by a preponderance of the evidence. We found this lower

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[6] *In re Estate of Wells*, 221 Neb. 741, 380 N.W.2d 615 (1986).

[7] *Id.*; *Johnson v. Graf*, 162 Neb. 396, 75 N.W.2d 916 (1956).

[8] See *In re Estate of Wells, supra* note 6.

[9] See, e.g., *Johnson v. Graf, supra* note 7.

[10] *In re Estate of Wells, supra* note 6.

standard of proof applicable because the other alleged partner was deceased and the action was against the State contesting inheritance taxes. As such, we characterized the plaintiff's action as falling under the third-party rule.

[5] We have never explained, nor is there any reasoning to support, the confusing myriad of standards we have applied to what is, effectively, the same legal issue. Thus, we believe that the tenuous distinction between actions by alleged partners inter sese and actions by a third party against the alleged partnership should be abolished. In civil actions, a preponderance of the evidence is generally all that is required to sustain the claim of a party.[11] Exceptions to this standard for civil actions are uncommon[12] and are generally reserved for cases "where particularly important individual interests or rights are at stake," such as termination of parental rights, involuntary commitment, and deportation.[13] While a preponderance of the evidence standard allows "both parties to 'share the risk of error in roughly equal fashion.' . . . Any other standard expresses a preference for one side's interests."[14]

Generally, in both law and equity, proof of alleged contracts between the parties need only be shown by a preponderance of the evidence.[15] We see no reason to hold out a special standard for partnership relations that favors the party denying the relationship over the party asserting that the partnership exists. And the logic behind imposing a higher burden of proof in actions between alleged partners as opposed to actions by third parties against an alleged partnership has never been fully articulated.

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[11] *State v. Neimer*, 147 Neb. 284, 23 N.W.2d 81 (1946). See, also, *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989) (superseded on other grounds by Civil Rights Act of 1991).

[12] *Price Waterhouse v. Hopkins, supra* note 11.

[13] *Herman & MacLean v. Huddleston*, 459 U.S. 375, 389, 103 S. Ct. 683, 74 L. Ed. 2d 548 (1983).

[14] *Id.*, 459 U.S. at 390.

[15] See, e.g., *Lewis v. Poduska*, 240 Neb. 312, 481 N.W.2d 898 (1992); *Hersch Buildings, Inc. v. Steinbrecher*, 198 Neb. 486, 253 N.W.2d 310 (1977); *Dunbier v. Rafert*, 170 Neb. 570, 103 N.W.2d 814 (1960); *Herrin v. Johnson Cashway Lumber Co.*, 153 Neb. 693, 46 N.W.2d 111 (1951).

By eliminating any common-law distinctions as to the burden of proof between actions alleging a partnership inter sese and actions by third parties, we bring greater predictability and consistency to partnership determinations.

In our de novo review, we thus determine whether Willson established by a preponderance of the evidence that he and King were partners in a business that entailed both the development of the key dispenser-revalue station and regular QuikPay sales and maintenance.

Association

We first consider whether King and Willson formed an association. King correctly points out that inherent to the term "association" is the idea that the relationship between the "two or more persons" be intentional.[16] King argues that no partnership was formed because he never intended to form a partnership relationship with Willson. "In the domain of private law the term association necessarily involves the idea that the association is voluntary."[17] It is perhaps for this reason that the district court found it significant that King and Willson "never entered into any specific agreement which would establish a partnership."

[6] But, as § 67-410(1) explicitly states, the intent necessary to form an association does not refer to the intent to form a partnership per se. There is no requirement that the parties have a "specific agreement" in order to form a partnership. People do not become partners when they attain co-ownership of a business for profit through an involuntary act.[18] But, if the parties' voluntary actions form a relationship in which they carry on as co-owners of a business for profit, then "they may inadvertently create a partnership despite their expressed subjective intention not to do so."[19] Intent, in such cases, is still of prime concern,

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[16] See Bromberg & Ribstein, *supra* note 5, § 2.05(a).

[17] Unif. Partnership Act (1914) § 6, comment 1(1), 6 U.L.A. 394 (2001).

[18] Bromberg & Ribstein, *supra* note 5, § 2.05(a).

[19] Unif. Partnership Act (1997) § 202(a), *supra* note 4, comment 1 at 93. See, also, *Bass v. Bass*, 814 S.W.2d 38 (Tenn. 1991); 59A Am. Jur. 2d *Partnership* § 139 (2003).

but it will be ascertained objectively, rather than subjectively, from all the evidence and circumstances.[20]

Because of this, King's focus on his intent to form a corporation, as opposed to a partnership, does more to prove an intent to form the requisite association than to disprove it. It is, in fact, not unusual for courts to find a partnership relationship between parties that were operating with the intent to form a corporation and to specifically avoid a partnership relationship.[21] Even where a corporation has successfully been formed, courts have found a partnership relationship between the shareholders when the corporation is a mere agency for convenience in carrying out the joint venture or partnership.[22]

In *Hauke v. Frey*,[23] we found sufficient evidence of a partnership relationship between two parties who admittedly had once intended to form a corporation, but had never done so. The plaintiff in *Hauke* was the sole titleholder of the business property, which operated as a bowling alley, and he claimed he had no partnership with the defendant who was allegedly in wrongful possession of his property. According to the plaintiff, the defendant was merely an employee who managed the business in return for a set monthly wage. While the receipt of payment for services could be interpreted against a partnership relationship, there was also evidence that the defendant had purchased some equipment for the business and that the defendant was a mandatory signatory on a partnership bank account used for business expenses. We concluded although there was not an agreement containing complete details either of organization or of functions after organization, the conduct of the parties

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[20] See, *In re Estate of Wells, supra* note 6; *South Sioux City Star v. Edwards, supra* note 2.

[21] See, e.g., *Wine Packing Corp. of Cal. v. Voss*, 37 Cal. App. 2d 528, 100 P.2d 325 (1940).

[22] *Arditi v. Dubitzky*, 354 F.2d 483 (2d Cir. 1965); *Bartomeli v. Bartomeli*, 65 Conn. App. 408, 783 A.2d 1050 (2001); *Koestner v. Wease & Koestner Jewelers*, 63 Ill. App. 3d 1047, 381 N.E.2d 11, 21 Ill. Dec. 76 (1978); *Elsbach v. Mulligan*, 58 Cal. App. 2d 354, 136 P.2d 651 (1943).

[23] *Hauke v. Frey*, 167 Neb. 398, 93 N.W.2d 183 (1958).

implied a partnership that was to continue until a corporation could be organized to take its place.

In considering the parties' intent to form an association, it is generally considered relevant how the parties characterize their relationship or how they have previously referred to one another.[24] The joint use of a business name is evidence of an association.[25] This is especially true when the business name is composed of the parties' names or initials.[26]

It is undisputed that King and Willson discussed the fact that Secure Data Systems had the initials of Scott, Don, and Scott. Granted, at its inception, Secure Data Systems was an association among three parties focused on the limited task of creating a key dispenser-revalue station. But, despite King's claim that the acquisition of all of Datakey's QuikPay inventory and customer base was insignificant, after this occurred, King removed any QuikPay operations from his Washco business. He instead began to conduct all QuikPay business exclusively through Secure Data Systems. Willson was clearly associated with King in that venture.

At that point, in e-mail correspondence with Datakey in regard to various complaints with the QuikPay system, King no longer referred to himself in the first person singular, but instead in first person plural, as "us" or "we." Business cards were created for King and Willson describing their respective positions in Secure Data Systems. King and Willson went as joint representatives of Secure Data Systems to a Las Vegas carwash convention. King and Willson worked together both in servicing the QuikPay line, assembling and repairing Datakey's old inventory, and developing the key dispenser-revalue station. Various e-mails to customers and to Datakey evidence their joint efforts in this regard. To King and to others, Willson

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[24] *Mardanlou v. Ghaffarian*, 135 P.3d 904 (Utah App. 2006).

[25] See, e.g., *Van Dyke v. Bixby*, 388 Mass. 663, 448 N.E.2d 353 (1983); *Beck v. Indiana Surveying Co.*, 429 N.E.2d 264 (Ind. App. 1981).

[26] See, e.g., *PHC-Minden, L.P. v. Kimberly-Clark Corp.*, 235 S.W.3d 163 (Tex. 2007); *Landise v. Mauro*, 725 A.2d 445 (D.C. 1998); *Grissum v. Reesman*, 505 S.W.2d 81 (Mo. 1974); *Asamen v. Thompson*, 55 Cal. App. 2d 661, 131 P.2d 841 (1942).

referred to himself and King as partners. Specifically in regard to ventures involving the regular QuikPay system, King referred to Willson as "the other half of Secure Data Systems." We believe the evidence is clear that King and Willson formally associated to develop a key dispenser-revalue station and that further, this association expanded in scope to encompass all QuikPay operations.

Co-ownership

Still, King asserts that any reference he made to Willson as the "other half of Secure Data Systems" was an insignificant figure of speech. Most importantly, according to King, there was no partnership because Willson never had co-ownership of the QuikPay business. King claims that he started selling and maintaining QuikPay by himself and asserts that he maintained full control of that business line. According to King, Willson simply did what King asked him to—apparently for free.

[7-9] Being "co-owners" of a business for profit does not refer to the co-ownership of property,[27] but to the co-ownership of the business intended to garner profits. It is co-ownership that distinguishes partnerships from other commercial relationships such as creditor and debtor, employer and employee, franchisor and franchisee, and landlord and tenant.[28] Co-ownership generally addresses whether the parties share the benefits, risks, and management of the enterprise such that (1) they subjectively view themselves as members of the business rather than as outsiders contracting with it and (2) they are in a better position than others dealing with the firm to monitor and obtain information about the business.[29]

[10] The objective indicia of co-ownership are commonly considered to be: (1) profit sharing, (2) control sharing, (3) loss sharing, (4) contribution, and (5) co-ownership of property.[30] The five indicia of co-ownership are only that; they are not all necessary to establish a partnership relationship, and no single

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[27] See, § 67-410(3); 59A Am. Jur. 2d, *supra* note 19, § 140.

[28] See Callison & Sullivan, *supra* note 5, § 5:11.

[29] Bromberg & Ribstein, *supra* note 5, § 2.14.

[30] *Id.*; Callison & Sullivan, *supra* note 5, § 5:11.

indicium of co-ownership is either necessary or sufficient to prove co-ownership.[31]

The district court found that King and Willson had "pooled resources, money and labor." This is significant evidence of contribution. The record demonstrates that Willson contributed his time and expertise not only to the business of developing the key dispenser-revalue station, but also to the continued operations of the regular QuikPay product line. And even if Willson had not more directly contributed to regular QuikPay business, we again note that the business of QuikPay and the business of developing a peripheral product that would ensure QuikPay's continued viability in the marketplace were inextricably commingled. This was especially true with regard to Willson's contribution when King emphasized that Willson had to help keep the QuikPay system running because, otherwise, the development of the key dispenser-revalue station would lose its customer base and become irrelevant.

The continuing investment of one's labor without pay is generally considered a strong indicator of co-ownership.[32] It is evidence that, as Willson testified he explicitly understood, the party is not an outsider contracting with the business.[33] Valid consideration for an ownership interest in a partnership may take the form of either property, capital, labor, or skill, and the law does not exalt one type of contribution over another.[34]

In this case, Willson contributed his time and expertise without any compensation for approximately 1 year. Conservatively, Willson estimated his contribution as totaling over 2,000 hours. King did not present evidence of how many hours he had spent in the QuikPay venture. But more importantly, we conclude on our review of the record that without Willson's technical

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[31] See Bromberg & Ribstein, *supra* note 5, § 2.07(a).

[32] See, e.g., *Schymanski v. Conventz*, 674 P.2d 281 (Alaska 1983); *Huffman Technical Drilling, Inc. v. Smith*, 424 So. 2d 435 (La. App. 1982).

[33] Bromberg & Ribstein, *supra* note 5, § 2.07(c).

[34] *Kennedy v. Miller*, 221 Ill. App. 3d 513, 582 N.E.2d 200, 163 Ill. Dec. 934 (1991); *South Sioux City Star v. Edwards, supra* note 2; *Cutler v. Bowen*, 543 P.2d 1349 (Utah 1975); *Chaiken v. Employment Security Commission*, 274 A.2d 707 (Del. Super. 1971); 59A Am. Jur. 2d, *supra* note 19, § 95.

assistance, King would have been unable to continue QuikPay's viability after Datakey abandoned the product. That King could have dealt with certain issues by hiring contractors or employees is irrelevant. He chose not to do so—presumably because the promise of the key dispenser-revalue station made a partnership relationship more worthwhile—and saved himself the expense of paying for this labor.

We also find that despite King's protestations to the contrary, the evidence shows that King and Willson shared control over QuikPay business. We note that control is "elusive because of the many gradations of control and because partners often delegate decision-making power."[35] Still, Willson testified that he and King consulted with each other over what appropriate pricing would be as they picked up Datakey's equipment and customers. This is evidenced by an e-mail of the price list that King sent to Willson. Under King's theory of the case, the e-mail would have been completely unnecessary, because according to King, Willson contributed very little and had no direct contact with customers or their billing.

Willson testified that he and King made joint decisions to cut certain costs. Willson set up the invoice system they used to bill QuikPay customers, and there is no indication that such a system was anything other than that of Willson's independent initiative and design. Willson made technical decisions on how best to assemble, repair, or maintain various aspects of the QuikPay system. The June 2003 e-mail written by King illustrates King's understanding that he and Willson would jointly address QuikPay customer issues as they arose and jointly evaluate Secure Data Systems' priorities as they went along.

Willson also testified that he had an agreement with King to share profits, although King denies this. Of the five indicia of co-ownership, profit sharing is possibly the most important, and the presence of profit sharing is singled out in § 67-410(3)(c) as creating a rebuttable presumption of a partnership.[36] However, what is essential to a partnership is not that profits actually be

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[35] Bromberg & Ribstein, *supra* note 5, § 2.07(a) at 2:79.

[36] See, also, *Farmers & Merchants Bank v. Grams*, 250 Neb. 191, 548 N.W.2d 764 (1996); *Frisch v. Svoboda*, 182 Neb. 825, 157 N.W.2d 774 (1968).

distributed, but, instead, that there be an interest in the profits.[37] Willson's testimony that they agreed to share in the profits of the business is, in light of all the evidence, simply more credible than King's statement that compensation "was never discussed." And even King vaguely admits that they had an understanding to share profits of the key dispenser-revalue station, if that were developed. It seems reasonable to assume that this same understanding would apply to Willson as his participation and the scope of the venture expanded to encompass all QuikPay business.

We do not find any evidence that King and Willson had an agreement for loss sharing. But we find this of little import, since purported partners, expecting profits, often do not have any explicit understanding regarding loss sharing.[38] Likewise, although King and Willson admittedly do not own any joint property, in an informal relationship, the parties may intend co-ownership of property but fail to attend to the formalities of title.[39] Moreover, in this case, it is unclear that there is much QuikPay "property" at all. Certainly, as King's counterclaim alleged, Willson has possession of some QuikPay equipment. To the extent that a bank account is property, we note that although Willson had delegated financial matters to King and was not a signatory to the bank account where Secure Data Systems' revenues were deposited, Willson testified that King did keep him abreast of the financial status of that account. Willson believed he had an ownership interest in the funds in that account.

We conclude that the objective, as well as subjective, indicia are sufficient to prove co-ownership of the business of selling, maintaining, and developing QuikPay. Having already concluded that there was an association for the same, we conclude that Willson proved that he and King had formed a partnership for the business of selling, maintaining, and developing QuikPay.

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[37] See, Bromberg & Ribstein, *supra* note 5, §§ 2.06(c) and 2.07(b); Callison & Sullivan, *supra* note 5, § 5:10.

[38] See Bromberg & Ribstein, *supra* note 5, § 2.07(d).

[39] Bromberg & Ribstein, *supra* note 5, § 2.07(f).

CONCLUSION

Because Willson has proved a partnership relationship with King, he is entitled to a winding up and an accounting in accordance with the Act. The district court erred in concluding otherwise. Accordingly, we reverse the decision and remand the cause for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

HEADNOTES
Contained in this Volume